

(29,783)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 473

NAMPA & MERIDIAN IRRIGATION DISTRICT, APPELLANT,

vs.

J. B. BOND, PROJECT MANAGER OF BOISE PROJECT OF  
THE UNITED STATES RECLAMATION SERVICE, AND  
PAYETTE-BOISE WATER USERS' ASSOCIATION, LTD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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IN THE

**DISTRICT COURT OF THE UNITED STATES IN AND FOR  
THE DISTRICT OF IDAHO, SOUTHERN DIVISION**

No. 983

NAMPA & MERIDIAN IRRIGATION DISTRICT, Complainant,

vs.

J. B. BOND, Project Manager of Boise Project of the United States  
Reclamation Service, Defendant

**BILL OF COMPLAINT**

The Complainant alleges:

1. That the plaintiff is a corporation duly organized, existing and doing business under the laws of the State of Idaho relating to Irrigation Districts.

2. That the Defendant, J. B. Bond, is the duly appointed, authorized and acting Project Manager of what is known as the Boise Project of the United States Reclamation Service and as such has executive charge and control over the delivery of water from said Boise Project. That said Boise Project is an irrigation system constructed by the United States and situated chiefly in the Counties of Ada and Canyon in the State of Idaho.

3. That the said Plaintiff Irrigation District contains about 65,000 [fol. 8] acres of irrigated land lying in Ada and Canyon Counties in Idaho, of which about 40,000 acres receives *its* entire water supply from that certain irrigation system constructed by the United States and known as the Government irrigation system of the Boise Project, and the remainder thereof is supplied mainly out of the old water rights of the District supplemented by a certain amount of stored water furnished by the United States out of the Arrowrock Reservoir of the said Boise Project as provided in that certain contract between the United States and the District hereinafter referred to.

4. That the said Forty Thousand (40,000) acres of land irrigated entirely with water from the Government irrigation system of the Boise Project is known and commonly referred to as the project lands of the District, and the lands irrigated mainly out of the old water rights of the District are commonly known and referred to as the old water right lands of the District.

5. That pursuant to the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388) known as the Reclamation Act, and acts of Congress supplementary thereto or amendatory thereof, the United States, acting through the Secretary of the Interior, has authorized and caused to be constructed that certain irrigation project located

in the States of Idaho and Oregon known as the Boise Project. That the lands irrigated entirely with water supplied from the irrigation works of the said Boise Project about four-fourteenths (4/14ths) are located in the Nampa & Meridian Irrigation District, and about ten-fourteenths (10/14ths) outside of the District.

6. That on or about June 1, 1915, the Defendant, Nampa & Meridian Irrigation District, entered into contract with the United States for the construction of a drainage system in the District, purchase of supplemental storage water rights from Arrowrock Reservoir for the old water right lands of the District, and full water rights for the project lands of the District, a copy of which contract is hereto attached, marked Exhibit "A" and made a part hereof, and thereafter entered into a supplemental contract with the United States, a copy of which is hereto attached, marked Exhibit "B," and made a part hereof.

7. That the said contracts were duly authorized by the electors of the District at elections held for that purpose, in the manner and in full compliance with the State Law and in like manner as in the case of a bond issue, and the said contracts and all proceedings in connection therewith were duly confirmed by decrees of the District Court in the manner provided in the State Statute. That the benefits of said contracts were duly apportioned by the directors of the [fol. 10] District and the apportionment thereof confirmed by the decrees of the District Court as provided in the State Statutes.

8. That Section 12 of the said contract of June 1, 1915, provided among other things:

"The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project and the same shall be collected by the District for the United States, and paid over by the District to the United States, and upon notice from the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge."

9. That the drainage system provided for in the said contract between the United States and the Defendant, Nampa & Meridian Irrigation District, has been constructed by the United States.

10. That as a result of irrigation from the said irrigation system of the Boise Project the water table is rapidly rising under portions of the Boise Project outside of the Nampa & Meridian Irrigation District, particularly in the Golden Gate, Wilder, Arena and Deer Flat sections in the lower half of the project, and that in the opinion of the officials of the United States Reclamation Service it has become necessary to construct a drainage system in said portions of the [fol. 11] project in order to prevent the lands thereof from being ruined by seepage and alkali. That the Secretary of the Interior

has caused to be made surveys and investigations of a proposed drainage system for said lands and has caused investigations to be made of the seepage and ground water conditions under said portions of the project, from which it appears that several thousand acres of land in said sections are in immediate danger from the ground water table which is now within five (5) feet of the surface and steadily rising, and that if drainage is not provided, said lands will suffer irreparable injury from seepage and water-logging.

That the Secretary of the Interior has approved the said proposed drainage system and has authorized the construction thereof as a part of the operation and maintenance work of the Boise Project with funds to be collected for that purpose from the water users as an operation and maintenance charge.

11. That for the purpose of providing the necessary funds for the construction of said drainage system as aforesaid the Secretary of the Interior on February 15, 1921, issued a public notice, copy of which is hereto attached and made a part hereof, and marked Exhibit "C".

12. That this Plaintiff has duly paid all operation and maintenance charges claimed by the Hon. Secretary of the Interior under [fol. 12] par. (a) of said notice marked Exhibit "C", to this date, and that the payments so made by plaintiff to the United States fully re-imbursed the United States for all maintenance and operation expenses actually incurred on account of the Project lands of the United States within the Plaintiff District and constituted full payment of all operation and maintenance charges for which Plaintiff or the said Project Lands within the Plaintiff District were or are liable under the provisions of the said contracts between Plaintiff and the United States, referred to as Exhibits "A" and "B" unless it shall be held that under the terms of said contracts Plaintiff is liable for a pro rata part of the cost of construction of the drainage works referred to in Par. 10 hereof.

13. Plaintiff alleges that under Par. (b) of the said notice marked Exhibit "C", the Honorable Secretary of the Interior demanded of the Plaintiff on or about April 1, 1921, payment of 50 cents per irrigable acre for said Project Lands within the Plaintiff District, for use by the said United States in constructing the said drainage works referred to in Par. 10 and 11 hereof, which payment Plaintiff has at all times refused to make on the ground that neither Plaintiff nor the Project Lands with the Plaintiff District were liable therefor under said contract; that the construction of said drainage works was not an operation or maintenance charge as contemplated in said contracts but was in fact a construction charge for the benefit of lands [fol. 13] outside the Plaintiff District, which the Secretary of the Interior had no jurisdiction to levy against Complainant and which Complainant had no jurisdiction to levy under the laws of Idaho against the lands within its boundaries; and that the cost of said proposed drainage works should be collected solely from the Project Lands outside of Complainant District under the certain con-

tract, stipulation and judgment, hereinafter referred to as Exhibits —.

14. That on the — day of —, 1921, there was a certain action pending in the above entitled Court wherein Payette-Boise Water Users Association, Limited, a corporation, was Complainant, and J. B. Bond, C. C. Fisher, Charles F. Weinkauff (as the executive officers of Boise Project) Riverside Irrigation District, Pioneer Irrigation District and Nampa & Meridian Irrigation District were defendants.

That on said date a decree was entered in said action which settled and determined the issues therein as between the Complainant and the said defendants, J. B. Bond, C. C. Fisher and Charles F. Weinkauff, and which decree was based on the certain stipulation entered therein by the Complainant, Payette-Boise Water Users' Association, representing the water users from said Boise Project, whose lands were situated outside the boundaries of the Nampa & Meridian [fol. 14] Irrigation District and the Pioneer Irrigation District, and the Secretary of the Interior, and which stipulation is embodied in said decree as a part thereof, Complainant attaches hereto a copy of said decree as Exhibit "D", excepting therefrom the Exhibit "B" referred to in the stipulation in said decree, being entitled —. That this Complainant and the said defendants therein, Pioneer Irrigation District and Riverside Irrigation District, were not parties to said stipulation nor did said decree determine any of the issues in said suit as between Complainant therein and this Complainant but that the issues in said action as between the Complainant therein and this Complainant were determined by the certain supplemental decree in said proceedings, entered therein on the — —, 1921, a copy of which is attached hereto as Exhibit "E".

That immediately upon the entry of said decree, the water users from Boise Project represented by the said Payette-Boise Waters Users' Association, being the land owners of the Project outside of Complainant District, individually entered into the certain contract provided for in said decree and appearing therein as Exhibit "A" of the said stipulation, and thereby contracted and agreed that the Secretary of the Interior might build the said drainage works referred to in Par. 10 hereof and that the landowner would pay the charges [fol. 15] therefor provided in said contract.

Complainant alleges that none of the land owners receiving Project water within the Complainant District signed said contracts nor did said stipulation make provision therefor; neither has this complainant at any time consented to the same or been a party thereto.

That the Honorable Secretary of the Interior has no authority or jurisdiction to construct said works except under the said contracts of said individual land owners and with the payments made by them as provided therein.

15. Complainant alleges that no part of the said sum so demanded of Complainant by the Secretary of the Interior and for which Complainant has refused payment, has been or will be used for the maintenance or operation of the canals, reservoirs, drainage works, etc., designated in the said contracts between Complainant

and the United States as the Boise Project; but that said sum is for use in the construction of new drainage works which were not contemplated or provided for in said contracts; and that Complainant has no authority or jurisdiction to incur said expense except in pursuance of a plan or contract therefor, duly approved by the vote of two-thirds of the electors of the district as provided by the laws of Idaho.

[fol. 16] 16. That Complainant has been advised by the defendant that unless said payments are made, defendant will be compelled and required to shut off the supply of water Complainant is entitled to receive from the Boise Project for the said Project lands within the boundaries of Complainant.

17. That defendant threatens and if not enjoined and restrained by the mandatory injunction of this Court will refuse to specifically perform said contract referred to herein as Exhibit "A" of this Complaint by delivering to Complainant the water supply from the Boise Project for use of Project Lands within the Complainant District as therein provided; and that the failure of defendant so to do will irreparably injure and damage this Complainant and the owners of the said lands.

18. That Complainant has no other speedy or adequate remedy in the premises.

Wherefore, Complainant prays that the Court adjudge and decree:

1. That neither Complainant nor any of the said Project Lands within its boundaries are liable for any part of the costs of said proposed drainage works.

2. That a mandatory writ of injunction issue requiring defendant to specifically perform said contract and deliver to Complainant the water supply therein provided for, and for such other and further [fol. 17] relief as to the Court shall seem meet and equitable.

Hugh E. McElroy, Attorney for the Complainant. Residence, Boise, Idaho.

#### EXHIBIT "A" TO BILL OF COMPLAINT

Draft of July 24, 1914

This agreement made this 1st day of June, 1915, between the United States of America, acting for this purpose by the Secretary of the Interior, under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388) known as the Reclamation Act, and acts amendatory thereof or supplementary thereto, and the Act of Congress of February 21, 1911, (36 Stat. L. 925), the party of the first part, hereinafter called the United States, and the Nampa & Meridian Irrigation District, an Irrigation District organized under the laws of the State of Idaho, and located in Canyon and Ada

Counties, Idaho, acting for the purposes of this contract under authority of the Title 14 of the Idaho Revised Codes, including Sections 2396, 2397, 2398, the party of the second part, hereinafter called the District—

Witnesseth—That,

Whereas, the District includes within its boundaries about Twenty-four Thousand Five Hundred Fifty-seven (24,557) acres of irrigated land, Twenty-two Thousand Six Hundred Twelve (22,612) [fol. 18] acres of which are entitled to receive water from the District; the remainder being irrigated with water from the Settlers' and New York Canals; and whereas, the District owns and controls that certain canal known as the Ridenbaugh Canal through which water is supplied from Boise River to the lands of the District for irrigation and domestic purposes, and whereas, the natural flow of Boise River which the District is entitled to divert under its priorities and appropriations, is insufficient during the latter part of said irrigation season to furnish a complete water supply for the lands of the District, and the District desires to secure a certain amount of stored water in order to furnish its land owners and water users a more complete water supply during the low water periods of the irrigation season, and

Whereas, the ground water table is rising in the District and in places is already close to the surface, so that a large part of the lands of the District are likely to become permanently ruined and incapable of producing crops, or bearing any share of the expense of the District, unless a drainage system is promptly provided; and whereas, it is believed that such a drainage system will reclaim considerable areas which cannot now be cultivated successfully on account of such seepage conditions, and will check the spread of such [fol. 19] seepage conditions, and save other large areas which are now threatened with destruction from the same cause; and

Whereas, the United States is now constructing, under the provisions of the Reclamation Act, that certain irrigation project known as the Boise Project, including the Arrowrock and Deer Flat storage reservoirs, and a portion of the lands of the District have been subscribed to said project by the individual owners of such lands; and

Whereas, it is believed that under existing conditions the only way in which the additional water supply and drainage system required by the District can be secured promptly and at a cost which the land owners of the District can afford to pay, is by means of a contract between the District and the United States, under the provisions of the Acts of Congress of June 17, 1902 (32 Stat. 388) and February 21, 1911 (36 Stat. L., 925) and Title 14 of the Idaho Revised Codes.

Now, therefore, it is hereby agreed—

1. That as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian



Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars (\$557,000.00). The location of the drains, to be constructed, is shown on the map attached hereto and marked Exhibit "A," it being understood that in general [fol. 20] drains numbered "one" on the said map will be constructed first, drains numbered "two" will be constructed next, drains numbered "three" will be constructed last, so far as said limit of expenditure will allow such work to go, such drainage system to have sufficient capacity in its main drains to carry the seepage water flowing into the District from the lands lying above the District and draining into it, as well as that originating in the District itself. The Supervising Engineer in charge of such construction shall have the right to make changes in the alignment of the drains shown on the attached map, and in grades and cross-sections, where such changes shall be found in his judgment to be necessary or desirable to increase the efficiency or economy of the system. It is understood that in case any part of the work shown on the said map shall prove unnecessary for the benefit of District lands, such part may be omitted by mutual consent of the parties hereto. It is fully understood that the United States is to expend only Five Hundred Fifty-seven Thousand Dollars (\$557,000.00,) including cost of preliminary work in drainage construction for the District, under this contract, and to stop when such limit of expenditure has been reached. It is not expected that the lands of the District can be completely drained at this cost nor a drainage system extended to each farm [fol. 21] unit, but that only a number of principal drains will be constructed with which individual and community farm drains can be connected.

2. That for the purposes of this contract, irrigable lands in the District which are now entitled to five-eighths of a miners' inch of water or more per acre, out of the present water rights of the District, or the Settlers' District or through ownership of stock in the New York Canal Company, are considered as old water right lands and referred to herein under that name; irrigable lands in the District which have no water right from the District or the Settlers' District, and have not been irrigated through ownership of stock in the New York Canal Company, are considered as project lands and referred to herein under that name, and irrigable tracts of land in the District which are entitled to some water from the present water rights of the District, or of the Settlers' District or through ownership of stock in the New York Canal Company, but less than five-eighths of an inch per acre, shall be considered as old water right lands to the extent of the number of acres for which the water right of such tract will provide five-eighths of an inch per acre, and project lands as to the remainder thereof.

3. That the District will pay to the United States for that portion of the above described drainage work in the District, equity chargeable to the old water right lands in the District, the sum of Two [fol. 22] Hundred Sixty-six Thousand Dollars (\$266,000), in the same number of annual installments not less than ten (10) and

same percentages of the total in each annual installment as is fixed by the Secretary of the Interior for the lands of the Boise Project in his Public Notice announcing the construction charge for the Boise Project, the first installment to be due and payable one (1) year after the day on which said Public Notice for the Boise Project is issued by the Secretary of the Interior, and one installment on the same day of each year thereafter until all installments are paid, and will use the taxing power of the District and all the powers and resources of the District to collect said sums of money and pay the same to the United States when due. The benefits of the expenditures of said sum of Two Hundred Sixty-six Thousand Dollars (\$266,000) for drainage shall be apportioned among the old water right lands of the District. No portion of said sum of Two Hundred Sixty-six Thousand Dollars (\$266,000) shall be apportioned to the project lands in the District but the balance of the said sum to be expended on drainage works in the District as provided in paragraph 1 hereof shall be charged to the general expense of the Boise Project and the project lands in the District shall pay the construction, operation and maintenance charges provided in paragraphs 11 and 12 hereof.

[fol. 23] 4. That after the construction thereof, the District will maintain said rainage system in good serviceable condition, at its own expense, and shall charge the cost thereof to the old water right lands in the District in the proportion which the amount of construction cost chargeable to the old water right lands in the District to-wit Two Hundred Sixty-six Thousand Dollars (\$266,000), bears to the total construction cost, to-wit, Five Hundred Fifty-seven Thousand Dollars (\$557,000), and will charge the balance to the United States. In case the District shall fail or neglect to maintain said drainage system in good serviceable condition, the United States may maintain or repair the same and charge the cost thereof to the District, which cost the District will promptly pay.

5. The right to water developed in the drainage system herein provided for shall belong to the Boise Project and the old water right lands of the District, and be divided between said Boise Project and said old water right lands of the District in the same proportion as the cost of the drainage system herein provided, and the drains to be constructed under this contract shall be subject to use by the lands of the Boise Project whether outside or inside the District, as well as the old water right lands of the District.

6. That the District will pay to the United States the sum of [fol. 24] Twenty-four Thousand Eight Hundred Forty Dollars for a storage capacity in Arrowrock Reservoir—a reservoir to be constructed by the United States on Boise River in Boise and Elmore Counties, Idaho, and to have a capacity of between 200,000 and 250,000 acre feet—and the United States will provide for the District that portion of the total storage capacity of Arrow rock Reservoir which Twenty-four Thousand Eight Hundred Forty Dollars is of the total cost of said reservoir, and will deliver at the downstream



end of the outlets of the Arrowrock Reservoir, for the District each year after the completion of said reservoir, the same proportion of the stored water available from said reservoir at such times after three (3) days' notice from the District to the United States officer in charge, and in such quantities as the District may direct not in excess of the District's proportionate part of the available outlet capacity. The total cost of said reservoir will be determined and stated by the Secretary of the Interior in his Public Notice of the charges to be made for the Boise Project, and to include all cost and expenses of whatsoever nature or kind for the purpose of, growing out of, in connection with, or resulting from the construction of said reservoir including engineering expenses and overhead charges, and such interest, if any, as may be payable on account of advances under the provisions of the Act of Congress of June 25, 1910 (36 Stat. L. 835), or other legislation by Congress.

[fol. 25] 7. The said sum of Twenty-four Thousand Eight Hundred Forty Dollars shall be paid by the District to the United States in the same number of annual installments not less than ten (10) and same percentage of the total in each annual installment as is fixed by the Secretary of the Interior for the lands of the Boise Project in his Public Notice announcing the construction charge for the Boise Project, the first installment to be due and payable one (1) year after the day on which said Public Notice for the Boise Project is issued by the Secretary of the Interior and one installment on the same day of each year thereafter until all installments are paid; and the District will use the taxing power of the District, and all the powers and resources of the District to collect said sums of money, and pay the same to the United States when due, and will also pay each year its proportionate share of the cost of operation and maintenance of said reservoir and delivery of water therefrom, as announced by the Secretary of the Interior.

8. No interest will be charged on any of the said installments for drainage work, or stored water, or money to be paid to the United States for operation and maintenance, on account of the drainage works or stored water, until due; but any part thereof which may remain unpaid after the same is due shall bear interest from maturity until paid at ten per cent (10%) per annum, and the United [fol. 26] States shall not be obliged to deliver or turn out for the District any stored water while the District is in default on any of the payments herein provided to be made by the District to the United States.

9. The District agrees to distribute the amount of water delivered to it by the United States under this contract in full compliance with the provisions of said Reclamation Act of June 17, 1902, and the rules and regulations thereunder, and to use and distribute the same only upon the lands within the District, and in compliance with the provisions of Section 2 of the Act of Congress of February 21, 1911 (36 Stat. L. 925) known as the Warren Act.

10. The stored water from Arrowrock Reservoir hereinabove agreed to be purchased by the District, shall be diverted from Boise River through the canal system of the District and delivered to old water right lands in the District to supplement the water supply of such lands at times when the natural flow of Boise River is insufficient, and the benefits and cost of such stored water shall be apportioned to such lands; Provided, however, that no portion of said stored water is to be delivered and no part of the cost thereof apportioned to those old water right lands of the District to which the first priority right of the District has been allotted under the classification of lands as to priority, which has been made by the [fol. 27] District, it being considered that the lands having the first priority need no stored water.

11. For the project lands in the District, the United States will provide both storage capacity in the reservoirs of the United States and carrying capacity in the United States Canal System of the Boise Project, and each year after the completion of the Arrowrock Reservoir, will deliver to the District for distribution to the Project lands in the District lying under the canal system of the District, as nearly as practical, the same proportionate share per acre of the water actually available from said works of the United States, both flood water and stored water, as is provided for similar lands in the United States Boise Project, outside of the District except as otherwise provided in paragraph 12 hereof, but no more, however, than is needed for beneficial use on said land, and for the project lands in the District lying above the canal system of the District a similar water supply for the project lands in the District will be furnished directly by the United States through the laterals and canals of the United States. The water supply for the project lands in the District shall be carried through the Main Canal of the United States Boise Project, and that portion for the project lands lying under the canal of the District delivered to the District at convenient points in the District where laterals or distributing canals [fol. 28] from the Canal System of the United States reach or cross the canal of the District, and will there be received by the District and distributed by the District to the project lands in the District entitled to the use thereof; under the provisions of a certain contract for the distribution of water, between the parties hereto, dated April 1, 1909, it being understood that the said certain contract shall remain in effect until such time as a new contract shall be mutually agreed upon by the parties hereto, providing for a different method of distribution of water and division of the cost of distribution.

12. The District will promptly apportion to the project lands in the District a total of Three Million Three Hundred Four Thousand Five Hundred (\$3,304,500) Dollars, being a charge of Seventy-five dollars (\$75.00) per acre as the benefits under this contract to said lands; provided, however, that if the building charge per acre announced by the Secretary of the Interior in his Public Notice for similar lands of the Boise Project, is less than Seventy-five dollars

(\$75.00) per acre, then the assessment of benefits against the project lands in the District shall be reduced to the same amount per acre as is announced by the Secretary of the Interior for the similar lands of the Boise Project, and the District will collect the sums so apportioned to such project lands in the District and pay the same to the United States in the same number of annual installments not [fol. 29] less than ten (10) and same schedule of graduated payments as is fixed by the Secretary of the Interior in his Public Notices for similar lands of the Boise Project outside of the District. Provided, that should the construction charge per acre announced by the Secretary of the Interior, for the Boise Project for a full water right, be in excess of Seventy-five Dollars (\$75.00) per acre of irrigable lands, the benefits to be assessed to the project lands in the District under this contract from the said project lands for the payment to the United States of the construction charge, shall nevertheless be only Seventy-five Dollars (\$75.00) per acre, and the number of installments and the percentage of the total payable in each annual installment shall be the same number and percentage as for the lands of the Boise Project outside of the District, but in that event, the amount of both stored water and flood water furnished for such project lands in the District by the United States shall be the same proportion of the amount furnished per acre to the lands of the Boise Project outside of the District as Seventy-five Dollars (\$75.00) per acre is to the charge announced for the Boise Project lands outside of the District; Provided, that in that event, the owners of project lands in the District, individually or the District on behalf of all the project land owners in the District, may, if they or it so elect, by supplemental contract with the United States, secure from [fol. 30] the United States works additional water sufficient to make their water rights equal in amount per acre to the rights furnished by the United States to similar project lands outside of the District, by payment of the difference between Seventy-five Dollars (\$75.00) per acre and the charge announced by the Secretary of the Interior in his Public Notice for the lands of the Boise Project outside the District, but the amount to be apportioned to the project lands in the District under this present contract shall not be in excess of Seventy-five (\$75.00) Dollars per acre. The installments of the charges apportioned to the project lands in the District shall be due and payable from the District to the United States on the same dates as fixed by the Secretary of the Interior in his Public Notice for the payment of the charges for the lands of the Boise Project outside of the District. The District will be reimbursed by the United States for the cost of distributing the water to said project lands in the District by the payment to the District of the pro-rata share of the cost of operation and maintenance provided in the contract of April 1, 1909, between the District and the United States, until the expiration of said contract as provided in paragraph 11 hereof and thereafter under the new contract provided to be made in paragraph 11 hereof. The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary [fol. 31] of the Interior for similar lands of the Boise Project

and the same shall be collected by the District for the United States and paid over by the District to the United States, and upon notices from the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge.

13. It is fully understood that the old water right lands of the District shall not in any event be liable for any part of the charges herein agreed to be apportioned to and collected from the project lands, nor the project lands for any portion of the charges herein agreed to be apportioned to or collected from the old water right lands in the District, and the United States agrees to waive the right to hold either of said two classes of land for any part of the charges herein agreed to be apportioned to and paid by the other, but will look to the old water right lands for the old water right land charges and the project lands for the project land charges.

14. No interest will be charged on any of said installments for water to be supplied to said project lands in the District until due, but any part thereof which may remain unpaid after the same is due, shall bear interest from maturity until paid at ten (10%) per [fol. 32] cent per annum, and the United States shall not be obliged to deliver or turn out for the District any water for such project lands in the District as are in default on any of the payments herein provided to be made. Provided, the project lands in the District shall be subject to the same provisions as to residence, cultivation and limit of area as the lands of the Boise Project outside of the District.

15. The United States will assent to the release by the Payette-Boise Water Users' Association of such lands in the District as have been subscribed under stock subscription and contract to the said association, and have therefore become subject to the lien provided in such subscription and contract for the repayment of a proportionate part of the cost of the Payette-Boise Project from the lien obligation of such stock subscription, and also release and cancel the contract under date of October 12, 1906, between the Nampa-Meridian Irrigation District, and the Payette-Boise Water Users' Association, providing for a credit to the subscribed lands of the District for existing works, as regards both the old water right lands and the project lands.

16. The Payette-Boise Water Users' Association agrees to join in the release of said stock subscription contracts and liens upon conditions above stated, and its name is subscribed hereto in evidence thereof.

[fol. 33] - 17. Where any appropriations of water have been made and water rights acquired by parties other than the District out of any of the draws, sloughs or natural channels of the Nampa & Meridian Irrigation District, and such rights are interfered with by the deepening of such channels and the construction of the said drainage

system in the District, it is understood that the money herein provided for the construction of drainage works shall be available for the satisfaction of any just claims for damages and of judgments, liabilities or obligations on account of, growing out of, or resulting from the interference with any such rights by the deepening of such channels and construction of such drainage system, and that the United States may pay such claims, judgments, liabilities and obligations out of said money. Any lateral construction which may be agreed upon between the District and the United States as being necessary to replace the rights of flow through natural drainage lines, may be built by the United States as a part of the drainage system herein contemplated.

In witness whereof, the parties hereto have caused their names and seals to be attached the day and year first above written, the Nampa & Meridian Irrigation District, and the Payette-Boise Water Users' Association, acting in pursuance of resolutions of their Board [fol. 34] of Directors, of which certified copies are hereto attached and made a part hereof.

Nampa & Meridian Irrigation District, By H. B. Carpenter,  
President. Attest: G. A. Remington, Secretary. (Seal.)  
Payette-Boise Water Users' Association, By J. W. Brandt.  
Attest: W. L. Girard, Secretary. (Seal.) Andrieus A.  
Jones, First Asst. Secretary of the Interior, for and on Be-  
half of the United States. Sgd. Dec. 13, 1915.

#### EXHIBIT "B" TO BILL OF COMPLAINT

#### Supplemental Contract Between the Nampa & Meridian Irrigation District and the United States

Draft of December 20, 1917

[fol. 35] This agreement, made this 5th day of November, 1918, between the United States of America, acting for this purpose through E. C. Finney, First Assistant Secretary of the Interior, under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, and particularly Sections 2 and 3 of the Act of Congress of February 21, 1911 (36 Stat. 925), hereinafter referred to as the United States, and the Nampa & Meridian Irrigation District, an irrigation district organized under the laws of the State of Idaho, hereinafter referred to as the District,

Witnesseth, That:

1. Whereas, under that certain contract between the United States and the Nampa & Meridian Irrigation District, dated June 1, 1915, it is provided that as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa &

Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand (\$557,000) Dollars, and that the District will pay to the United States for that portion of the above described drainage work in the District equitably chargeable to the old water right lands in the District, the sum of Two Hundred Sixty-six Thousand (\$266,000) Dollars, and whereas, the drainage system contemplated under the provisions of said contract, and estimated [fol. 36] to cost approximately Five Hundred Fifty-seven Thousand Dollars, (\$557,000), has been constructed at a cost of approximately Three Hundred Forty Thousand Dollars (\$340,000), and whereas, it is not necessary to spend the balance of the said Five Hundred Fifty-seven Thousand Dollars (\$557,000), on the said drainage system, and whereas, neither the District nor the United States desires to spend any money unnecessarily on said work.

It is hereby agreed that said drainage construction shall be terminated at a cost of not to exceed Three Hundred Forty Thousand Dollars (\$340,000), and the amount to be paid by the District to the United States for that portion of the said drainage works equitably chargeable to the old water right lands in the District shall be reduced in like proportion as the said cost of Three Hundred Forty Thousand Dollars (\$340,000) is less than the said estimated cost of Five Hundred Fifty-seven Thousand Dollars (\$557,000), namely to  $266/557$ ths of Three Hundred Forty Thousand Dollars (\$340,000), or One Hundred Sixty-two Thousand Three Hundred Sixty-nine and Eighty-four hundredths Dollars, (\$162,369.84).

2. And whereas, said estimate of the actual cost of Three Hundred Forty Thousand Dollars (\$340,000) contains an allowance for certain items of contingent liability and expense which may or may [fol. 37] not have to be paid, and whereas, there is also some possibility of additional credits from the sale or transfer of equipment.

It is hereby agreed that should the actual cost as finally determined be less than Three Hundred Forty Thousand Dollars (\$340,000), the Secretary of the Interior will furnish the District a statement of such actual cost and in that event the amount to be paid by the District to the United States for that portion of the said drainage works equitably chargeable to the old water right lands in the District, shall be reduced to  $266/557$ ths of such actual cost so stated by the Secretary of the Interior.

3. And whereas, the said contract of June 1, 1915, provides for furnishing water rights for the project lands of the District at a charge of Seventy-five Dollars (\$75.00) per acre, with a proviso that if the building charge announced by the Secretary of the Interior in his Public Notice for similar lands of the Boise Project, is less than Seventy-five Dollars (\$75.00) per acre, then the assessment of benefits against the project lands in the District shall be reduced to the same amount per acre as is announced by the Secretary of the Interior for similar lands of the Boise Project, and whereas, the Secretary of the Interior, in his Public Notice of July 2, 1917, for the said Boise Project has announced a construction

[fol. 38] charge of Eighty Dollars (\$80.00) per acre with a proviso that if within one year all the irrigable lands of the Boise Project are duly pledged to return the payment of the construction and operation and maintenance charges either through individual contracts, water users' association contracts, or through irrigation districts, duly organized and confirmed by judicial decree, then the said charge of Eighty Dollars (\$80.00) per acre will be reduced to Seventy Dollars (\$70.00) per acre, and further provides that if all of that portion of the project lying northeast of Indian Creek between the Nampa & Meridian Irrigation District and the New York Canal, is duly pledged to return the payment of the construction and operation and maintenance charges, then the said construction charge of Eighty Dollars (\$80.00) per irrigable acre for a full water right will be reduced to Seventy Dollars (\$70.00) per irrigable acre in said portion of the project, and whereas, the said portion of the Boise Project is the portion immediately adjoining the District, and whereas, the landowners of the District, through the organization of an irrigation district and the said contract between the District and the United States have already complied with all those provisions required of the said adjacent lands of the Boise project as the conditions upon which the said Seventy Dollar (\$70.00) rate may be secured.

[fol. 39] It is hereby agreed and understood that the said rate of Seventy Dollars (\$70.00) per acre of irrigable land is the rate applicable to the said project lands of the Nampa & Meridian Irrigation District.

4. And whereas, the said contract between the District and the United States provides that the charges agreed to be paid by the District to the United States shall be payable in the same number of annual installments not less than ten (10) and same schedule of graduated payments as is fixed by the Secretary of the Interior in his Public Notice for similar lands of the Boise Project outside of the District, and whereas, under the provisions of the Act of Congress of August 13, 1914, known as the Reclamation Extension Act, and the Public Notice issued by the Secretary of the Interior under date of July 2, 1917, the charges for most of the lands of the Boise Project will be payable in twenty (20) annual installments upon the schedule of graduated payments set out in Section two of said Extension Act.

It is agreed and understood by the parties hereto that the construction charges agreed to be paid by the District to the United States for drainage, storage rights and full water rights, shall be due and payable in twenty (20) annual installments upon the schedule of graduated payments set out in Section 2 of the said [fol. 40] Extension Act, namely:

—The first four of such installments shall each be two per centum, the next two installments shall each be four per centum, and the next fourteen shall be each six per centum, of the total construction charge.



5. And whereas, in allotting water rights and apportioning benefits under the said contract of June 1, 1915, the District omitted to furnish any water rights to, or assess any benefits against, the dry lands within the corporate limits of the City of Nampa, and whereas there are about Two Thousand Five Hundred Ninety-five and Twenty-five hundredths (2,595.25) acres of dry lands within the said corporate limits, and whereas, the said lands are arid lands, incapable of producing agricultural crops without irrigation, but fertile and productive if irrigated and especially valuable for intensive farming purposes on account of their location, and whereas, there is no other available source of water supply for said lands except from the irrigation work constructed by the United States.

Now, therefore, it is hereby agreed that the District will purchase from the United States for said lands, and the United States will sell to the District for said lands, water rights from the irrigation works of the said Boise Project, and the District will pay the United States for said rights at the same rate per acre and will ap-[fol. 41] portion benefits to said lands at the same rate per acre as other project lands in the District and the water rights to be furnished for said lands to be of the same kind and furnished upon the same terms and conditions as those furnished to project lands of the District outside of the corporate limits except that the District may deliver the water to the landowners at the corporate limits of the town of Nampa and shall not be required to distribute the water within the corporate limits, and that in the construction of the laterals for said lands the United States will not construct such laterals within the corporate limits of the City, except, where laterals of the same kind commonly built by the United States outside of the said corporate limits, can be built without any extra or unusual expense, the water to be distributed within the said corporate limits by the landowners themselves, or by such agency as they may select and provide for that purpose at their own expense, and all structures or special construction or maintenance required by the ordinances, regulations and police power of the City, shall be provided by the landowners of the City at their own expense.

6. And whereas, under the provisions of Section 6 of said contract of June 1, 1915, the District purchased from the United States storage rights in Arrowrock Reservoir to the extent of the proportionate part of the storage capacity of said reservoir that Twenty-four Thousand Eight Hundred Forty Dollars (\$24,840.00) is of the total cost of said reservoir (\$4,750,000), and whereas, certain landowners of the District require some additional storage water and have applied to the District for approximately One Thousand Nine Hundred Ninety-two and three-tenths (1,992.3) acre-feet of additional storage capacity, and agreed to pay for the same;

It is hereby agreed that in addition to the Twenty-four Thousand Eight Hundred Forty Dollars (\$24,840.00) provided in sections 6 and 7 of said contract of June 1, 1915, the District will pay to



the United States the sum of thirty-nine thousand eight hundred forty-six and no/100 dollars (\$39,846.00) for storage capacity in Arrowrock Reservoir, and the United States will furnish the District in addition to the proportionate part heretofore contracted, the use and benefit of that portion of the total storage capacity of Arrowrock Reservoir which Thirty-nine Thousand Eight Hundred Forty-six Dollars (\$39,846.00) is of the total cost of said reservoir, and will deliver at the downstream end of the outlets of said reservoir for the District each year, as nearly as is reasonably practical, the same proportion of the stored water actually available from said reservoir, the said storage to be in addition to the amount heretofore contracted for and to be furnished in the same manner and [fol. 43] upon the same terms and conditions as the amount heretofore purchased under said contract of June 1, 1915.

7. And whereas, the Secretary of the Interior has approved rules and regulations for determining the irrigable acreage of the lands of the Boise Project outside of the District and under said rules and regulations has provided for certain reductions in irrigable acreage for rights of way of roads and canals;

It is hereby agreed and understood by the parties hereto that the same reductions provided under said rules and regulations as to project lands outside of the District will be applied in determining the irrigable acreage of project lands in the District.

8. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in section 116 of the Act of Congress approved March 4, 1909 (35 Stat. L., 1109).

[fol. 44] United States of America, By E. C. Finney, First Assistant Secretary of the Interior. Nampa & Meridian Irrigation Dist., By Dan Barker, President. Attest: G. A. Remington, Secretary. (Seal.)

# EXHIBIT "C" TO BILL OF COMPLAINT

## Public Notice

(No. 6)

Boise Project, Idaho-Oregon

Department of the Interior,  
Washington, D. C., February 15, 1921.

1. Annual Operation and Maintenance Charge for Drainage.—In pursuance of Section 4 of the National Reclamation Act of June 17,

1902, (32 Stat. 388) and of Acts amendatory thereof, or supplementary thereto, particularly the Extension Act of August 13, 1914, (38 Stat. 686) announcement is hereby made that the annual operation and maintenance charge for the irrigation season 1921 and until further notice against all lands of the Boise Project under Public [fol. 45] Notice (except the One Thousand Eight Hundred (1,800) acres, more or less in the State of Oregon) shall be divided into two parts:

(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.

(b) A special operation and maintenance charge for drainage purposes of One Dollar (\$1.00) per irrigable acre per year until further notice, to become due and payable Fifty (50c.) cents per irrigable acre on April 1, 1921, and Fifty (50c.) per irrigable acre on October 1, 1921, and Fifty (50c.) cents per irrigable acre on March 1st and October 1st of each year thereafter until further notice, the money received from such special operation and maintenance charge to be used after the same has been paid in to the United States, in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and waterlogging of the lower lying lands of the project by seepage from the irrigation of the higher lands and by seepage from the irrigation system of the project, to lessen the damage which would otherwise result from the operation of said canal system and to maintain the irrigability of the lands of the project, said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the [fol. 46] remainder of said minimum charge per acre and all charges per acre-foot of water used in excess of the amounts of water allowed for such minimum charge to be hereafter announced and determined by Public Notices to be hereafter issued from time to time.

John Barton Payne, Secretary of the Interior.

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#### EXHIBIT "D" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT  
OF IDAHO, SOUTHERN DIVISION

In Equity. No. 640

PAYETTE-BOISE WATER USERS' ASSOCIATION, LIMITED, Plaintiff,

vs.

J. B. BOND et al., Defendants.

DECREE—Filed July 28, 1921

This cause coming on to be heard upon stipulation for decree, by the parties to said cause, and the same having been approved by the

United States of America, acting in that behalf by the Secretary of the Interior, and it appearing from said stipulation that the plaintiff and the United States of America have entered into a certain supplemental contract bearing date the 12th day of July, 1921, wherein and whereby all differences between the parties in the above entitled [fol. 47] cause have been adjusted and settled, which said stipulation and supplemental contract, together with the two exhibits attached to said contract as "A" and "B," "B" being a copy of Exhibit "X" filed in the suit, incorporated herein and made part hereof, are as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

[Title omitted]

#### STIPULATION FOR DECREE

The Plaintiff and the United States of America having entered into that certain Supplemental Contract bearing date the 12th day of July, 1921, wherein and whereby all the differences between the parties in the above entitled matter have been adjusted and settled, and wherein it is provided that Decree may be entered in said cause, it is therefore stipulated that Decree may be entered in said cause in accordance with the terms of said supplemental contract, a duplicate copy of which is hereto attached and made a part hereof.

That findings of facts and conclusions of law are hereby waived. [fol. 48] J. B. Eldridge, Attorney for Plaintiff. J. L. McClear, B. E. Stoutemyer, Attorneys for Defendants J. B. Bond, C. C. Fisher and Charles F. Weinkauff.

Approved this the 19th day of July, 1921.

United States of America. E. C. Finney, Acting Secretary of the Interior.

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Department of the Interior

United States Reclamation Service

Boise Irrigation Project

CONTRACT BETWEEN THE UNITED STATES AND PAYETTE-BOISE WATER USERS' ASSOCIATION SUPPLEMENTAL TO CONTRACT OF FEB. 13, 1906

This agreement, made this 12th day of July, 1921, between the United States of America, herein referred to as the United States, acting for this purpose through E. C. Finney, Acting Secretary of the Interior, herein referred to as the Secretary, under the provisions of the act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof

or supplemental thereto, herein referred to as the reclamation law, and the Payette-Boise Water Users' Association, Ltd., herein referred to as the Association, witnesseth:

[fol. 49] 2. Whereas, under contract dated February 13, 1906, provision was made for the construction of the Boise Federal irrigation project, Idaho-Oregon, and for payment of the cost thereof; and

3. Whereas, in that certain case entitled, Payette-Boise Water Users' Association, Ltd., vs. J. B. Bond, et al., now pending undetermined in the District Court of the United States for the District of Idaho, Southern Division, there are involved, among other things, certain controversies with respect to the interpretation of said contract, to the payment of the cost of said project and to the quantity of water which the members of the Association shall receive for their lands; and

4. Whereas, it is desired by the parties hereto that said litigation be compromised and settled, and that all issues pending in said cause be adjusted, through the making of a contract supplementary to said contract of Feb. 13, 1906;

5. Now, therefore, in consideration of the mutual covenants and agreements herein contained the parties hereto do hereby agree as follows:

6. That in addition to the one-half portion of Arrowrock Reservoir heretofore dedicated (in that certain instrument certified copy of which has been introduced in evidence in said suit as Defendants' Exhibit "X") to the lands referred to therein as the "project lands [fol. 50] of the constructed unit" of the Boise Project, the said project lands of the constructed unit of said project shall have the use and benefit of an additional Fifty-two hundred sixty-eighths (50/268ths) of the capacity of Arrowrock Reservoir and no more, and the said additional Fifty-two hundred sixty-eighths (50/268ths) shall be paid for by the owners of such project lands upon the same terms and conditions applicable to the portion heretofore dedicated.

7. That if Congress authorizes and appropriates funds for such expenditure and such expenditure is voted and agreed to as supplemental construction by a majority of the water right applicants and entrymen affected by the charge therefor as provided in Section 4 of the Act of Congress of August 13, 1914, known as the Reclamation Extension Act, then as soon after July 1, 1922, as is reasonably practicable, the United States will expend Two Hundred Thousand (\$200,000) Dollars on canal improvements on the canal system of the Boise Project, to consist mainly of additional concrete lining and other improvement and enlargement work on the Main Canal. It is estimated by the Project Manager that such expenditure will provide sufficient enlargement of the said Main Canal to safely carry through said canal during the flood water season of an average or normal year, about Forty-eight Thousand (48,000) acre-feet more [fol. 51] water than has been carried heretofore, and to such extent

without lessening the delivery of flood water from the canals during May and June, avoid drawing down Deer Flat Reservoir during said months.

8. Should the Secretary of the Interior find it advisable to do so, he may increase the amount to be expended on such canal improvement work to an amount not exceeding Two Hundred Twenty-five Thousand (\$225,000) Dollars. Any additional amount so expended shall be added to the amount (Seven Million Three Hundred Thousand (\$7,300,000) Dollars) provided in paragraph 13 hereof, to be used in determining the proper charge per acre at the next readjustment date. It is understood that similar elements of cost will be charged to such canal improvement work and a similar method of distributing overhead or general expense will be used, as has been used in the above case of other features of the Boise Project. After the completion of said canal improvement work, the Secretary of the Interior will furnish a statement of the amount expended thereon, which in the absence of fraud or such gross error as would be equivalent to fraud, shall be considered as final and conclusive and binding on all parties as to the amount expended thereon.

9. From and after the date that the said canal improvement work shall have been voted and agreed to by a majority of the water right [fol. 52] applicants and entrymen affected by the charge therefor as provided in Section 4 of the said Act of Congress of August 13, 1914, until the completion of the expenditure of Two Hundred Thousand (\$200,000) Dollars on said canal improvement work, the project lands of the constructed unit of the project may have the temporary use of the Twenty-six Thousand (26,000) acre-feet of Arrowrock storage, or Twenty-six Two Hundred Sixty-eighths ( $26/268$ ths) of the capacity of Arrowrock Reservoir intended for permanent use on proposed extensions of the project, but under no condition shall such project lands of the constructed unit of the project acquire, or be construed to have any right to the use thereof, or any part thereof, after the construction of said Two Hundred Thousand (\$200,000) Dollars of canal improvement work, and the Association, its shareholders, successors and assigns, and all those claiming under the Association, expressly consent and agree that upon the completion of the expenditure of Two Hundred Thousand (\$200,000.00) Dollars on such canal improvement work, the right to the use of the said twenty-six thousand (26,000) acre-feet of storage on the project lands of the said constructed unit of the project shall terminate and the right to the use thereof shall revert in the United States as fully and completely in all respects as if no part of said Twenty-six Thousand (26,000) acre-feet had ever been used [fol. 53] upon the said project lands of the said constructed unit of the project, and it is agreed and understood that after the expenditure of said Two Hundred Thousand (\$200,000) Dollars in the construction of said canal improvement work, the said Twenty-six Thousand (26 000) acre-feet, or Twenty-six/Two Hundred sixty-eighths ( $26/268$ ths) of the said reservoir may be used upon the proposed Hillcrest Extension of the Boise Project in the Hillcrest and

Boise-Mora Irrigation Districts, or applied to such other use as may be decided upon and approved by the Secretary of the Interior and the Decree in said suit shall so provide. It is understood, however, that the use and benefit of the return flow from the Hillcrest and Boise-Mora Irrigation Districts into the New York Canal and Indian Creek will be allowed to the project lands of the said first or constructed unit of the project, as an additional water supply. If said canal improvement work, after having been authorized by the water users, is stopped through any act of plaintiff or of a member of plaintiff, the temporary use of said 26,000 acre-feet of water shall immediately cease and be restored only upon the interference of said work having been removed.

10. It is agreed and understood that all future drainage work in the constructed unit of the said Boise Project shall be provided for by operation and maintenance charges to be announced from [fol. 54] time to time by the Secretary of the Interior as operation and maintenance charges for drainage purposes and assessed against all project lands in the constructed unit, or first unit of the project. The operation and maintenance charges for drainage purposes coming due and payable in 1921 shall be One (\$1.00) Dollar per acre, of which Fifty (50c.) per acre shall come due and payable April 1, 1921, and Fifty (50c.) per acre on October 1, 1921, and the Association, on behalf of itself and its shareholders, stipulates and agrees to the payment of the charges so announced for drainage purposes as a proper operation and maintenance charge, and the Association guarantees the payment of the said drainage charges so announced against its shareholders by the Secretary of the Interior, and will use all the powers and resources of the Association to assist the officers of the United States in the collection of the same, or to itself collect and pay the same to the United States, the funds so paid in for drainage purposes to be expended under the direction of the Secretary of the Interior in the construction of drainage works on the constructed unit of the Boise Project beginning with those portions of the project where in the opinion of the engineer in charge of the said project, after counseling and advising with the Board of Directors of the Association, and drainage is considered to be most urgently needed. The project lands of the constructed unit [fol. 55] of the project may have the use and benefit of the water supply developed in the proposed drainage system, provided the Association or owners of such project lands furnish the means for diverting, or pumping, such water from the drains into the canal system and pay the cost of the operation and maintenance of such pumps or other means of diversion.

11. It is hereby stipulated and agreed that an amended form of water right application to be provided for and required under the Decree in said suit shall contain a provision expressly agreeing to the payment for future drainage work on the said Boise Project as an operation and maintenance charge; that in said water-right application appropriate provisions shall be made for the return and repayment to the United States of the Construction charges herein pro-

vided to be repaid, with reference and description of the interest acquired by the applicant when payments shall have finally been made as herein provided; that such water-right application shall be fully recorded; and the Court may limit the time in which water right application shall be received, and provided appropriate penalties for failure to execute and deliver such water-right applications, within the time provided in said decree. Such water-right application shall be in form as Exhibit "A" hereto attached and made a part hereof. It is understood that in executing this contract the Association waives no right to collect any and all unpaid assessments [fol. 56] heretofore made by it against its members of their stock in said Association.

12. It is understood, however, that the said operation and maintenance charge for drainage shall not apply to the Eighteen Hundred (1,800) acres of project lands in Oregon which have been annexed to the Big Bend Irrigation District and have provided for drainage and are assessed therefor in addition to the regular charge for project water right.

13. It is hereby stipulated and agreed that the amount properly chargeable to the project lands of the constructed unit of the project outside of the Irrigation Districts and subject to the Association as the construction charge, is the sum of seven million three hundred thousand (\$7,300,000) dollars, including the additional fifty-two hundred sixty-eighths (50/268) of the Arrowrock Reservoir, and the Two Hundred Thousand (\$200,000) Dollars of canal improvement work to be provided as supplemental construction, but not including future drainage work (which drainage work will be charged as operation and maintenance.)

14. That the construction charge per acre shall be readjusted every five (5) years for four (4) times and no more, and shall be determined by dividing the said sum of Seven Million Three Hundred Thousand (\$7,300,000) Dollars by the number of acres of ir- [fol. 57] rigable lands referred to as project or full Government water right lands in said first or constructed unit of the project outside of the Nampa & Meridian, Black Canyon and Settlers' Irrigation Districts then found to be subscribed to accepted water right applications and paying construction charges, and by debiting or crediting each tract with such amount as is necessary to adjust the construction charge to the new rate per acre so determined, allowing credit, or making additional charge to make up for any over-payment or underpayment in previous years, such credit (if there be a credit) to be allowed on the next construction payment coming due after such readjustment of the rate per acre, and such debit or additional charge (if a debit or additional charge be required in making such adjustment) to be added to and become due and payable at the date of the next construction payment after the date of such readjustment of the charge per acre, and it is agreed and understood that it shall be provided in the Decree and in the amended form of water right application to be provided for in the



Decree, that the rate of construction charge per acre so determined as aforesaid (whether more or less than the rate announced in the Public Notice and set out in water right applications previously signed) is the rate which shall control and the rate which shall be paid by all of the Association's shareholders.

[fol. 58] 15. Acreage on which the charges are suspended on account of seepage shall be deducted in arriving at the number of acres to be used as the divisor in determining the proper charge per acre, but whenever any part of such suspended areas shall be brought back to a productive condition and be again irrigated and be placed on a paying basis then the acreage so recovered shall at the next readjustment date be added to and be considered a part of the number of acres to be used as the divisor in determining the proper charge per acre. In determining what part of any tract or farm unit is irrigable, the amount shown as irrigable on the official form unit plats shall be used.

16. Whenever any shareholder of the Association shall be in arrears more than one (1) year for the payment of any charge for operation and maintenance and penalties, or any part thereof, the Association will, upon notice from the Secretary of the Interior, or the agent or employee of the Secretary of the Interior in charge of the Boise Project, use all the powers and resources of the Association to enforce payment by such stockholder to the United States and to carry out the Association's guarantee under the contract of February 13, 1906, between the Association and the United States, but if on account of the abandonment of any tract of land, or for any other reason, any construction or operation and maintenance [fol. 59] payments thereon remains due and unpaid for more than three (3) years, the same shall then be considered as not being on a paying basis and shall be deducted from the number of acres used as the divisor in determining the proper charge per acre at the next readjustment date, but may be again added to the acreage used as divisor if payments are resumed.

17. The charge per acre shall be first readjusted as provided above on January 1, 1926, or as soon as practicable after such date and according to the conditions existing on said date and shall be again readjusted each fifth (5th) year thereafter, limited, however, to 4 readjustments and no more.

18. If on account of failure of the necessary majority of the water users affected thereby to vote or agree to pay the said Two Hundred Thousand (\$200,000) Dollars for canal improvement work as supplemental construction, or for any other reason the said canal improvement work should not be built, proper credit will be allowed at the next readjustment date.

19. It is agreed that the acreage of project lands in the constructed unit of the project outside of the Nampa & Meridian and Settlers' District which is now subscribed to water right applications is Ninety-five Thousand One Hundred Nine (95,109) acres, and that



the payment of Eight Hundred Fifty-two (852) acres are now suspended [fol. 60] pending on account of seepage, and that the construction charge per acre until the first readjustment on January 1, 1926, shall be determined by dividing said Seven Million Three Hundred Thousand (\$7,300,000) Dollars by Ninety-four Thousand Two Hundred Fifty-seven (94,257) acres, subject to readjustment every five (5) years as above provided. Credit for any over-payments heretofore made will be allowed on the construction instalment coming due December 1, 1921.

20. In the operation of the said Boise Project after the construction of said Two Hundred Thousand (\$200,000) Dollars of canal improvements, the United States and its successors in control of the project will try to equalize the benefits and the water supply between the lands supplied from Deer Flat and the lands supplied from Arrowrock as far as practicable and to that end will furnish as an additional water supply for the said project land above Deer Flat the Arrowrock storage secured by delivering certain waste and seepage waters into the Riverside and Phyllis Canals in exchange for Arrowrock storage to which the lands under said canals would otherwise be entitled, estimated to amount to about Two Thousand Two Hundred (2,200) acre-feet, and so far as practical will avoid running any Arrowrock storage water through Deer Flat after the use of stored water for irrigation has begun.

[fol. 61] 21. If a majority of the water users by vote or agreement approve the gradual enlargement of the Mora and Waldvogel Canals from year to year in connection with the annual cleaning work and the charging of such work to operation and maintenance, such gradual enlargement will be so carried on and charged unless it is held by the courts that that cannot be lawfully done.

22. It is understood that the said sum of Seven Million Three Hundred Thousand (\$7,300,000) Dollars includes ten-fourteenths (10/14th) of the amount charged in said Defendants' Exhibit "X" on account of what is known as the Page and Brinton claim now pending in the Court of Claims, said Court of Claims having allowed the amount of Fifty Thousand Two Hundred Twenty-eight and Ninety-three Hundredths Dollars of the sum of Three Hundred Twenty-five Thousand Nine Hundred Thirty-one and Ninety-seven Hundredths Dollars, being the amount of said Page and Brinton claim, and it being understood and agreed that an appeal may be taken by Page and Brinton or the United States in said cause, and that what may finally be paid cannot at this time be ascertained, and it is agreed that should such claim not be paid, or a less amount be paid thereon than charged in said Exhibit "X", then at the next readjustment date after the final termination or settlement of said case, the proper reduction shall be made in said sum of Seven Million Three Hundred Thousand (\$7,300,000) Dollars to the extent [fol. 62] of Ten-fourteenths (10/14ths) of the difference between the amount charged in said Exhibit "X" on account of such claim, and the amount actually paid thereon, and proper allowance be made

in readjusting the construction charges. It is understood that the said Page and Brinton claim is being resisted by the United States in said Court of Claims as an unwarranted and unjust claim and it is understood and agreed between the parties hereto that it is not intended by this instrument to recognize said claim, or any part thereof, as being a valid claim, and the Court may so provide in its Decree entered hereunder; and it is agreed that in similar manner any other claim, or judgment, which may hereafter be actually paid and not charged to operation and maintenance, may be added to the said Seven Million Three Hundred Thousand (\$7,300,000) Dollars in determining the proper charge at the next readjustment date.

23. It is agreed that the Court may enter Final decree in harmony with this contract.

24. No member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1905 (35 Stat. L., 1109).

25. A copy of the dedication referred to herein as Defendants' Exhibit "X" is hereto attached, marked Exhibit "B", and made a part hereof.

United States of America, By E. C. Finney, Acting Secretary.  
Boise-Payette Water Users' Association, Ltd., By C. M. Rankin, President. Attest: L. J. Magee, Secretary. (Corporate Seal.)

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### EXHIBIT "A"

Department of the Interior  
United States Reclamation Service

Boise Irrigation Project

Water-right Application

(Serial Number —)

(Date: — —, —)

1. I, — — —, in pursuance of the provisions of the Reclamation [fol. 64] Act approved June 17, 1902, (32 Stat., 388), and acts amendatory thereof or supplementary thereto, especially the act approved August 9, 1912 (37 Stat., 265), and the act approved August 13, 1914 (38 Stat., 686), all hereinafter called the Reclamation Law,

and the rules and regulations established thereunder, do hereby apply on behalf of myself, my heirs, executors, administrators, and assigns, for a water right for the irrigation of, and to be appurtenant to, — acres of irrigable land, as shown on plats approved by the Secretary of the Interior within the tract described as follows: —, Section —, Township —, Range —, — Meridian, containing a total of — acres.

2. The measure of water right for said land shall be the pro rata share as nearly as practical operations will permit, of the waters agreed to be furnished in that certain supplemental contract between the United States of America and the Payette-Boise Water Users' Association, Ltd., bearing date the 12th day of July, 1921, and the decree of court hereinafter referred to, and the dedication attached to said contract, which the number of irrigable acres described in this application is of the number of irrigable acres of project lands in the said first or constructed unit of the Boise Project.

[fol. 65] 3. I agree (a) to pay the annual instalments of the construction charge as provided in said above mentioned Supplemental contract, and the Decree of the Court in the case of Payette-Boise Water Users' Association, Ltd. vs. J. B. Bond, et al., in the United States District Court for the District of Idaho, Southern Division, at the rate of \$77.44 per acre of irrigable land subject to adjustments as provided in said Supplemental contract, and said Decree of Court as aforesaid, and to proper credits for all construction charges heretofore paid, on account of said land, and in addition thereto the annual charges for operation and maintenance as prescribed by the Reclamation Extension Act, and all penalties which may accrue for failure to make payments at the proper time; (b) that the construction charge and each and all of said annual charges for operation and maintenance with accrued penalties shall be and the same are hereby made a lien upon the tract of land above described and all water rights now or hereafter appurtenant or belonging thereto and all improvements now existing or hereafter made thereon, promising, covenanting, and agreeing to pay all taxes and other claims now or hereafter becoming a prior encumbrance, failing which, upon demand by any proper officer of the United States, or its successors in control of said project, the United States, or its said successors may pay the same and add the amount thereof to the lien hereby created [fol. 66] and recover the amount so paid as part of the said lien.

4. Upon my failure to comply with the terms of the Reclamation Law, and the regulations thereunder, this application may, in the discretion of the Secretary of the Interior, be cancelled by him with the forfeiture to all rights under the Reclamation Law and of all moneys theretofore paid hereon; excepting, however, from the force and effect of this paragraph any and every failure to make payments which shall become due and payable after the issuance of final certificate for the water right hereby sought under the Reclamation Law, a remedy for the failure thus excepted having been provided by said Law.

5. This application must bear the certificate, as hereto attached, of the water users' association, under said project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the construction, and the operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States, or where any such lien was given directly to the water users' association for the benefit of the United States, may be enforced through the medium of the water users' association; but the election of one remedy shall not preclude the United States from [fol. 67] following the other.

6. I further agree that the United States and its successors in charge of the said unit shall have full control over all ditches, gates, and other structures owned or controlled by the applicant or his successors in interest and which required to deliver water hereunder, and proper officers and employees of the United States and its successors shall have at all times the right of access to the above-entitled premises whenever it is, in the judgment of the officer or employee in charge of said unit, necessary for them in the discharge of their duties of distributing water to exercise said control. The apportionment and distribution of the water in accordance herewith shall be performed by the Project Manager and his successor. And I do hereby give, grant, bargain, sell and convey to the United States and its said successors the right for any such proper officer or employee to go and come upon any and all lands now or hereafter owned or held by me or them for any necessary or proper purpose and there exercise said control. In distributing and apportioning the water the Project Manager may take into consideration the character and necessities of the land. The remedy of any party feeling aggrieved by any alleged shortage or mistake in the delivery of water shall be by application first to the Project Manager, and then if necessary to the Court for an order for the correction of such error or mistake, but [fol. 68] neither the United States nor its officers or agents shall be liable in damages on account of any alleged shortage or mistakes in the delivery or division of the waters of the project.

7. It is understood and agreed that the United States reserves the right upon my failure or the failure of my successors in interest to keep and perform any of the provisions in this instrument contained by me and my successors in interest undertaken to be kept and performed, to refuse to deliver water to said lands or to stop the delivery of water thereto if water is being delivered, and such refusal to deliver or stoppage of delivery of water shall not operate to cancel this application, but shall be considered as an additional remedy to the United States to any remedies existing by reason of the provisions of this application or otherwise.

8. And I do hereby grant, bargain, sell, convey, and confirm to the United States of America and its successors in charge of the project all rights of way for ditches, canal, flumes, pipe lines, telegraph and telephone transmission lines, or other structures now constructed, or hereafter found necessary for construction, by or un-

der the authority of the United States for or in connection with the said project, and all rights of way that may be or become necessary and suitable and that may be required for the prosecution and operation of the said project, and for the construction, maintenance, [fol. 69] and operation of ditches, canals, flumes, pipe lines, telegraph and telephone, and transmission lines, constructed by or under authority of the United States and its successor in charge of the project for and in connection with said project, to have and hold the same, together with all the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in anywise appertaining to the United States of America and its assigns and successors in charge of the project forever, subject notwithstanding to the conditions upon which this application is made. It is understood and agreed that the United States reserves the right to recover and use for the benefit of the project all waste and seepage water arising on or flowing from said land and does not abandon but intends to use the same but as to water developed in the proposed drainage system it is understood that this reservation is subject to the provisions of paragraph 10 of contract of July 12, 1921, between the United States and the Payette-Boise Water Users' Association.

9. In consideration of the benefits received and to be received, and of the covenants herein contained, I promise and agree, to pay as an operation and maintenance charge, assessments for drainage upon the Boise Project, as levied from time to time by the Secretary.

10. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such corporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1909, (35 Stat. 1109).

11. And I, the said —, being duly sworn, depose and say that my postoffice address is —, that I am, or that I or my predecessor in interest was at the time of filing original water right application, a bona fide resident upon said land (or occupant thereof, residing in the neighborhood, namely, upon Section —, Township —, Range —, — Meridian, a distance in a direct line of — miles therefrom); that I hold the following interest in the said tract: —, as duly shown upon the records of — County, in volume (liber) — at page (folio) —; that no other application, now uncancelled, has been made for a water right under the Reclamation Law, appurtenant to land now owned or reclaimed by me, except as follows:

Application No. —, Project, of —, for —, Section —, Town- [fol. 71] ship —, Range —, — Meridian, an area of — acres and containing — acres of irrigable land, as determined by the Secretary of the Interior, for which the present application is substituted; and that the present application is made in my own behalf and not at

the instance or for the benefit of any other person or any association or corporation either directly or indirectly.

12. Nothing in this application contained shall be construed as in any manner or at all abridging, limiting, or depriving the United States of any means of enforcing any remedy in law or equity for the breach of any of the provisions of this application which it would otherwise have.

13. This contract shall extend to and be binding upon the heirs, successors, and assigns of the parties hereto.

In witness whereof, I ———, have hereunto set my hand and seal this — day of —, 1921.

——— (Seal.) ——— (Seal.) In the presence of  
(Three witnesses must sign here): ———.

[fol. 72] BLANK ACKNOWLEDGEMENT—Omitted in printing

—— —, 1921.

[fol. 73] I hereby certify that the applicant signing the above instrument has duly subscribed (or is the successor in interest of one who has subscribed) for the stock of this association for the lands described therein.

—— —, Secretary — Water Users' Association

Approved and accepted this — day of —, 1921, by authority of the Secretary of the Interior.

—— —, Project Manager

The Payette-Boise Water Users' Association, Ltd. agrees to the within and foregoing covenants, it being understood, however, that in so doing said Association waives no right to collect any and all unpaid assessments heretofore made by it against its members on [fol. 74] their stock in said Association.

Payette-Boise Water Users' Association, Ltd., By ———  
President. Attest: ———, Secretary.

Now, therefore, in accordance with said stipulation and supplemental contract, it is ordered, adjudged, and decreed that the construction, drainage and other charges of said project be paid to the United States of America, in the amounts and in the manner and upon the terms and conditions as provided by law and as set forth in said stipulation and supplemental contract; that all of the members of plaintiff upon said Boise Project within said first constructed unit or division shall, on or before sixty days from the date of this decree execute and deliver to the plaintiff association, who shall in turn approve, execute and deliver to the Project Manager of the Boise Project a water right application in form as that attached to said stipulation and supplemental contract, forming a part of this decree as aforesaid and that all the members of plaintiff shall be entitled to the water right, or right to the use of the waters of said system, as defined in said stipulation and supplemental contract and the dedication attached

thereto as Exhibit "B", upon the terms and conditions therein set out, and that all of the covenants and agreements of said stipulation and supplemental contract are hereby adopted and confirmed as a [fol. 75] part of this decree as fully and completely as if specifically set out in the body of this decree. Provided that where there is a provision of law prescribing the conditions under which water may be denied a user because of his default, neither the form of water right application incorporated herein nor the requirement hereof that such form be executed shall be construed as adding to or curtailing the rights of any party in interest as the same are defined by such provision of law. Nor in case of a controversy in good faith shall such application or this decree be construed as curtailing or opposed to the right of a water user to apply to a court of competent jurisdiction for temporary relief, or the power of such court upon a proper showing to direct that water continue to be supplied to the user until the controversy with him can be adjudicated or otherwise settled.

It is further ordered and decreed that after the expiration of sixty days from the date hereof the Project Manager may, in his discretion, decline to furnish water to any member of the plaintiff association for lands upon said first constructed unit or division outside of the organized irrigation districts, so long as such member neglects or refuses to execute said water right application as aforesaid.

The injunctive orders heretofore made *heretofore* are modified to conform to stipulation and contract attached hereto and so modified [fol. 76] will be continued in force until further order of the court or until the applications provided for herein have been filed. And the court retains jurisdiction of this cause for the purpose of making such further orders or disposition thereof as may be deemed proper.

No costs are awarded to either party.

Dated this 28th day of July, 1921.

Frank S. Dietrich, District Judge.

[File endorsement omitted.]

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#### EXHIBIT "E" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT  
OF IDAHO, SOUTHERN DIVISION

No. 640

PAYETTE-BOISE WATER USERS' ASSOCIATION, LIMITED, Plaintiff,

vs.

J. B. BOND et al., Defendants.

SUPPLEMENTAL OR AMENDATORY DECREE—Filed Sept. 1, 1921

This cause came on to be further heard this 30th day of August, 1921, all attorneys of record for the respective parties being present,



and it appearing that by inadvertance the decree heretofore, to-wit, [fol. 77] on the 28th day of July, 1921, entered upon the stipulation and agreement of the plaintiff and the duly authorized representatives of the Government, contains no provision disposing of the case as to other parties, and all parties through their respective counsel, now consenting that a supplemental or amendatory decree may be entered upon the record and the evidence heretofore adduced; therefore, to supplement said decree of July 28th, 1921, it is upon consideration, ordered, adjudged, and decreed as follows:

1. Upon motion of their attorney, the intervenors' complaint in intervention is hereby dismissed without prejudice.

2. The plaintiff is without right in and has no lien upon any lands within the Pioneer Irrigation District, or within the Nampa & Meridian Irrigation District, and is without right in or lien upon any lands lying under and receiving water from the canal of the Riverside Irrigation District, a private corporation, by virtue of the stock subscription contracts referred to in the complaint.

3. Pursuant to the terms of its contract with the Government, the Pioneer Irrigation District is the owner of the right to receive an undivided 56/750ths part of the storage water of Arrowrock reservoir, to be delivered as provided in said contract, and that the plaintiff is without right in or title to such proportionate interest.

[fol. 78] 4. Pursuant to the terms of its contract with the Government, the Nampa & Meridian Irrigation District is the owner of the right to receive such part of the water stored in Arrowrock reservoir as corresponds to the ratio between \$64,686.00, the amount paid to the Government therefor, and \$4,601,183.82, the cost of the reservoir, to be delivered as provided in said contract, and that the plaintiff is without right in or title to such proportionate interest.

Both of said rights are apart from and do not infringe upon the rights of the plaintiff in Arrowrock reservoir and the water stored therein, as defined and provided for in the original decree and the agreement embraced therein, and it is not to be understood that said decree is in any wise modified or affected by any provision herein contained.

Dated this 2nd day of September, 1921.

Frank S. Dietrich, District Judge.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

MOTION TO DISMISS—Filed April 22, 1922

Comes now the Defendant, J. B. Bond, and moves the Court to dismiss the complainant's complaint herein on the ground that the



facts stated in the said complaint are insufficient to constitute a [fol. 79] valid cause of action in equity and that the said complaint states no ground for equitable relief.

E. G. Davis, B. E. Stoutemyer, Attorneys for Defendant.  
Residence: Boise, Idaho.

Service by delivery of copy acknowledge this 22nd day of April, 1922.

Hugh E. McElroy, Attorney for Complainant.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

No. 983

(Title of Court and Cause)

DECISION ON MOTION TO DISMISS COMPLAINT—Filed Aug. 22, 1922

In accordance with the expressed desire of the parties, the averments of the complaint are given a liberal construction to the end that the merits of the controversy may be adjudged upon the motion to dismiss without the necessity of a trial more fully to disclose the particular facts.

1. Our discussion may be clarified by having at the *outside* a just understanding of the plaintiff's relation to the subject matter of the suit. Whatever may be its formal, legal status under its contract with the Government, it is not the real party in interest. In practice [fol. 80] it is but an intermediary, an agency, resorted to by the real parties in interest, for convenience, in the distribution of water and the collection of charges on account thereof. Back of it, as the real plaintiffs are the project lands within its borders; they are the sole beneficiaries.

2. Originally these lands had precisely the same status as all other lands on the Project.

3. This status was not materially altered by the contract between the District and the Government. The contract concerns procedure, and relates to form rather than substance. It clearly discloses the intent of the parties thereto that in effect all Project lands, both within and without the District, were to continue to be upon the same footing, sharing ratably in the benefits and burdens of the irrigation system.

4. While the facts are not expressly pleaded, it does appear in the record of the case the decree in which plaintiff pleads and exhibits as a part of the complaint, and in the public reports of the Reclama-

tion Service, that the cost of the drainage facilities constructed in the plaintiff district under the terms of the contract exhibited in the complaint (other than the part thereof allocated to old water right lands) was charged not to the plaintiff lands alone, although they were the only lands protected thereby, but ratably to all the lands in the Project. It is a further known fact that of the other Project [fol. 81] lands some are on the system above the plaintiff lands and other- are below; and most of these lands could receive no benefit at all from such drainage facilities and the others could be only slightly or indirectly benefited.

5. In fairness and equity, then, what can be said in defense of the position for which the plaintiff lands now contend? During the earlier part of the operation of the system, when they were threatened with destruction or injury from the rising ground water, they sought and were given protection by the construction of a drainage system, the cost of which was included in the general construction charge, and as such was, of course, ratably apportioned to all the lands in the Project. Now when as a result of the further operation of the system, for their use and benefit, as well as for the balance of the Project, other lands are menaced in the same way and from the same source, they seek to shift the entire burden of similar protective measures to the lands to be directly benefited. When they were threatened they did not, as now, invoke the doctrine of assessment of benefits; at least no such doctrine was recognized or applied in distributing the cost of the drainage facilities created for their protection.

6. Though there is no equity in the position, we are asked to sustain it because of certain consideration of technical law. In [fol. 82] substance, as I understand it, the reasoning is that the plaintiff lands are in an irrigation district, that the charges must be collected by assessments under the state law, and that before such assessments can be made there must be an apportionment of benefits; and that the plaintiff lands are in no need of further drainage facilities and hence no benefits can be apportioned. But in so reasoning sight is lost of a fundamental characteristic of all irrigation systems constructed under either the state or the federal laws. Such a project is an indivisible unit, the burden of constructing and maintaining which is apportioned ratably to all lands receiving water therefrom. A water user cannot divide a system into its component parts and decline to pay his share of the cost of constructing or maintaining, or of operating, those portions from which he receives no direct benefit. If a wasteway at the lower end of a system, or a drainage ditch, is essential to the lawful and efficient maintenance and operation of the system, it is properly to be regarded as a part of the system and a water user near the head can no more consistently decline to pay his ratable share for its construction and maintenance than he could decline to pay for the lower portion of the main canal, or for laterals that do not serve his lands. When the drainage ditches within the plaintiff district were constructed for the plaintiff lands they were correctly treated as a part of the

irrigation system, and quite as correctly their cost was distributed [fol. 83] ratably to all the lands without consideration of the question of direct benefit. It follows that by the apportionment already made in the district of the benefits of the system as a whole, pursuant to the state statutes, the basis of distributing cost has been fixed once for all; not the cost of constructing or maintaining any single unit but the entire system, including every feature thereof whether primary or auxiliary. It is the apportionment of the burden of constructing the entire project in accordance with the benefits received by the several tracts of land from the Project as a whole.

7, There is the further contention that this is not a proper charge for "operation" and "maintenance." These terms are found both in the reclamation act, as amended, and the contract between the plaintiff district and the United States. They are of elastic and often indefinite import. In systems of accounting, especially of public service corporations, what should be entered as capital or construction, and what as operation or maintenance, is not infrequently a question of great difficulty, and is sometimes susceptible of only an arbitrary answer. If in strictness we undertake to apply the narrow views advanced by the plaintiff that the maintenance of an irrigation system is accomplished by "merely maintaining the status quo" of the physical plant, we are soon driven to absurdities. If a wooden head-gate rots out we could not replace it with one of concrete, though satisfied that in the long run it would be economy so to do. If there turns out to be excessive seepage in a section of the canal it cannot be prevented by puddling or otherwise treating the canal to prevent waste, for that would be to change to status quo. If there is a break in the earth bank of the main canal on a side hill, however great the danger of a repetition of the break, and however prudent it would be to re-enforce the earth with a concrete lining, thus insuring against future disaster, such a course would be to alter the status quo, and therefore could not be followed without putting into motion the complicated machinery required for raising money for new construction work. But illustrations without number, of the inadequacy and impracticability of such a view, will readily occur to anyone who has observed the operation of a large irrigation system, either at close range or from a distance. The government has fixed the construction charge upon this system, under the law, and it cannot now add to it without the consent of a majority of all the water users. ¶ If, in the management of this great system, with its hundreds of miles of canals, its dams, and gates and a multitude of devices for diverting, impounding, carrying and distributing water, it cannot in an intelligent way provide for new conditions, or in the light of experience make new and better provision for old conditions, by charging the reasonable expenses thereof to maintenance and operation, the value and efficiency of the system would be greatly impaired. Surely such a result could not have been intended by Congress, or by the parties to the contract here involved. The terms maintenance and

operation must have been used in a broader sense—a meaning perhaps not susceptible to precise and comprehensive definition but none the less well understood.

True, the expenditures under consideration is relatively large, but it is to be borne in mind that it is to meet a condition which has gradually grown up as a result of the continued operation of the system. If each year there had been a collection and expenditure of an amount commensurate with the result of that year's operation, the case would present a different aspect, but would involve the same principle. By express admission the condition to be overcome is the direct result of operation, and is an incident thereof, and if the Project is to be "maintained" the expenditure must be made. If in the course of operation the management incurred a liability for injury to land by flooding or for destruction of crops, undoubtedly the expense of discharging such a liability would be borne as an operating expense. May it not take the less expensive course of providing safe-guards against such flooding and charge the expense thereof to maintenance and operation? With knowledge that the operation of the system without drainage facilities will inevitably swamp large areas of land, rendering the same worthless and de-[fol. 86]stroying the crops and trees growing thereon, must the plaintiff stand by until confronted with claims for damage?

Plaintiff frankly concedes that the condition against which the Government seeks to provide is a direct result of operating its irrigating system. It also concedes that while ground water is always a possible, if not a probable contingency, drainage facilities to take care of it cannot safely be provided in advance, for there can be no intelligent prognosis of just where such waters will rise and do or threaten injury. If, however, the cost of such facilities are chargeable only to construction, the Government is in this dilemma: Until it has completed its irrigation system and sold water rights and has delivered water to supply them, it cannot include such cost in the cost of construction, for there are no possible data upon which to base an intelligent estimate of the amount. But it must fix the "construction charge" before it can sell water rights. Hence such charge cannot be included in the construction cost as declared in the Public Notice; and the amount fixed in the Public Notice cannot thereafter be increased without the consent of a majority of the water users. Whether such consent would ever be given, even in case of the most urgent need, if such need is not general but only local as is likely always to be true, is a question that may be referred for answer to the attitude of the plaintiff lands in the instant suit.

[fol. 87] It is not thought that Congress could have intended that the terms, operation and maintenance, should be construed so strictly as thus to render the Reclamation Service impotent to protect the Government investment and the interests of the settlers. A reclamation project is for the reclamation and not the destruction of lands, and it is expected that the reclaimed lands will return the investment and maintain the Project as a going and fruitful concern. Here is an operation result highly injurious to the Project.

If the proposed protective measures are not taken, admittedly a large area of Project lands will be rendered worthless. If they are thus made worthless they will not only be incapable of returning to the Government their ratable and apportioned part of the construction cost, but they will also necessarily fail to carry any part of current maintenance and operation, and thus will be shifted their proper burden to the remaining lands on the Project, including the plaintiff lands. But this is not all. If in principle the plaintiff's contention is right, it is equally applicable to a case where the ground water rises uniformly over the entire Project, and threatens the destruction of all the lands at the same time. In such a case the Project as a whole cannot be "maintained" but is to be destroyed, as a result of "operation," because an admittedly sensible expenditure, by which such self-destruction can be avoided, may not be charged as an expense of either operation or maintenance. In other words, the [fol. 88] cost of self-preservation from an ordinary and necessary incident of operation is not chargeable to either maintenance or operation. To state the proposition is to reject it.

8. Finally it is suggested that until recently it has been customary with the Reclamation Service to carry drainage as a part of construction. I do not stop to inquire touching the correctness of the statement. The facts are not expressly pleaded, and if, so far as concerns this project, we go to the sources from which the facts are to be gotten, we find that at the time the drainage expenditures covered by the plaintiff's contract were made, the service also included in "Construction" cost, what are admittedly expenses of operation and maintenance. That is to say, during the long period prior to the giving of formal public notice the partially completed system was operated, and in the course of such operation large expenses were incurred over and above the rentals and other income for the same period, and this balance was covered into and charged against construction cost; it follows that a like disposition of the drainage expenditures has little interpretive significance.

It being thought that the proposed method of providing protective means, admitted to be necessary against a menace, conceded to be the direct result of operating the system, is fair and equitable, [fol. 89] and contravenes no statutory or contractual rights, the motion to dismiss will be allowed.

Hugh E. McElroy, Attorney for Plaintiff. E. G. Davis and  
B. E. Stoutemyer, Attorneys for Defendants. Eldredge  
& Morgan, Attorneys for Intervenor.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

DECREE—Filed Oct. 25, 1922

It appearing that the foregoing cause was duly argued to the Court upon the motion of the Defendant, J. B. Bond, praying for

an order for the dismissal of the bill of complaint, the Defendant present by B. E. Stoutemyer, Esq., his attorney and the Complainant present by H. E. McElroy, Esq., its attorney and the said Intervenor not present either in person or by attorney, and that the Court after due consideration allowed said motion and entered its order for the dismissal of said action on August 22, 1922;

Now therefore, it is hereby considered, ordered and adjudged [fol. 90] that said action be and the same is hereby dismissed and that the said Defendant recover his costs hereby taxed at —.

Dated this 25th day of October, 1922.

Frank S. Dietrick, Judge. O. K. B. E. Stoutemyer.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

PETITION FOR APPEAL—Filed Nov. 8, 1922

The above-named Complainant, feeling aggrieved by the decree and order of dismissal rendered and entered in the above-entitled cause on the 25th day of October, A. D., 1922, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Hugh E. McElroy, Solicitor for Complainant. Residence:  
Boise, Idaho.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Nov. 8, 1922

And now, to-wit: On this 8th day of November, 1922, it is ordered [fol. 91] that the foregoing petition be granted and that the appeal be allowed as prayed for and that plaintiff file a bond on appeal in the sum of \$200, with good and sufficient security, to be approved by the Court.

Frank S. Dietrick, District Judge.

[File endorsement omitted.]

## IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

ASSIGNMENT OF ERROR—Filed Nov. 8, 1922

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 25th day of October, 1922.

First. The Court erred in making the order filed on August 22, 1922, for the dismissal of the Bill of Complaint.

Second. The Court erred in making and entering the decree in said action on the 25th day of October, 1922.

[fol. 92] Third. The Court erred in holding as a part of the said order mentioned in the first specification, that the cost of the proposed drainage works, referred to therein, constituted a part of the annual maintenance or operation charges of the Boise Project under the terms of Sec. 5, of the Act of Congress approved August 13, 1914 (38 Stat. 686), commonly known as the Reclamation Extension Act, or at all.

Fourth. That the Court erred in holding as a part of said mentioned order, that the cost of the proposed drainage works, referred to therein, did not constitute an increase of the construction charges of Boise Project under the terms of Sec. 4 of the said Act of Congress commonly known as the Reclamation Extension Act, or at all, and was not governed by the provisions of said section.

Fifth. That the Court erred in holding as part of said mentioned order that the Hon. Secretary of the Interior could announce or determine the amount of said drainage charge, or any part of the operation or maintenance charge of Boise project, as a flat rate per acre.

Sixth. That the Court erred in holding that Subsection (b) of [fol. 93 & 94] Exhibit "C" attached to the Bill of Complaint constitutes a sufficient determination or announcement of an annual operation or maintenance charge for the Boise Project under the terms of Section 5 of said Reclamation Extension Act.

Wherefore, the applicant prays that said decree be reversed and that the District Court be directed to overrule Defendant's motion to dismiss and to proceed with the hearing of said Court according to law and the rules of procedure governing the disposition of equitable causes.

Hugh E. McElroy, Solicitor for Complainant. Residence:  
Boise, Idaho.

[File endorsement omitted.]



(Title of Court and Cause)

BOND ON APPEAL FOR \$200—Filed and approved Nov. 8, 1922;  
omitted in printing

[fol. 95] [File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

MOTION FOR ORDER AS TO CONTENTS OF RECORD—Filed Dec. 8, 1922

Complainant respectfully represents to the Court:

1. That it has perfected an appeal from the decree allowing the motion of the defendant for a dismissal of the Bill of Complaint and filed its præcipe with the Clerk for the transcript on appeal and defendant has consented to the terms of said præcipe.

2. That the Solicitors for Intervenors have filed a præcipe requesting the Clerk to include in said transcript a copy of the Complaint in Intervention filed by Intervenor.

3. That the Complainant objects to the inclusion of said copy of the Complaint in Intervention in said transcript for the reason that the same is not material to said appeal and would impose heavy and unnecessary expense on Appellant.

Wherefore, a difference having arisen between said parties concerning the general contents of the said record, Complainant hereby submits the same to the Court for determination under sub-section (c) of Rule 75 of the Rules of Practice for courts of equity of the [fol. 96] United States and prays the Court for an order covering the same.

Hugh E. McElroy, Solicitor for Complainant. Residence:  
Boise, Idaho.

Service by copy acknowledged this 7th day of December, 1922.  
Eldredge & Morgan, Solicitors for Intervenor.

[File endorsement omitted.]

## IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

PRÆCIPLE FOR FURTHER TRANSCRIPT SUGGESTED BY INTERVENOR—  
Filed Dec. 7, 1922

To the Honorable W. D. McReynolds, clerk of the above-entitled court:

You will please prepare and incorporate in the record on appeal of the plaintiff and appellant, Nampa & Meridian Irrigation District in the above entitled cause, the bill of complaint in intervention, filed by Payette-Boise Water Users' Association, Ltd., intervenor.

Dated this 7th day of December, 1922.

Eldredge & Morgan, Solicitors for Intervenor. Residence:  
Boise, Idaho.

Due service of the above and foregoing præcipe for further transcript suggested by intervenor and receipt of copy is hereby admitted [fol. 97] this 7th day of December, 1922.

Hugh E. McElroy.

[File endorsement omitted.]

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 IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

## STATEMENT FOR THE RECORD

Pursuant to order of the Court, Payette-Boise Water Users' Association, Ltd., filed a complaint in intervention in said cause, filed a motion to dismiss, embodied in the complaint in intervention and presented a written brief on the hearing of the motion to dismiss and set out, as a part of its complaint in intervention, a large number of exhibits, including what is known as Exhibit "X" in the record of the Payette-Boise Water Users' Association, Ltd., vs. J. B. Bond, et al., and referred to in the bill of complaint by the Nampa & Meridian Irrigation District and which said Exhibit "X" was omitted from the record in the bill of complaint but was referred to therein, as aforesaid, and which said Exhibit "X" was before the Court when it rendered its decision in said cause;

That said Exhibit "X," forming a part of this statement, constitutes a part of the contract between the Government of the United States, bearing date the 12th day of July, 1921, being the contract of which the complainant in this cause complains and seeks to set [fol. 98] aside and the Payette-Boise Water Users' Association, Ltd., intervenor herein; that the complaint in intervention contained a large number of exhibits and upon præcipe being filed by intervenor

for further record, asking that the whole of said bill of complaint in intervention be incorporated in the record, a hearing was had thereon upon objection of the complainant in this cause and the Court ordered that the complaint in intervention, in chief, together with Exhibit "X," as aforesaid, be incorporated in the record on appeal; that the following complaint, together with Exhibit "X," constitutes the complaint proper in the Court below and the particular Exhibit "X" incorporated therein, as aforesaid.

# IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

## COMPLAINT IN INTERVENTION

Leave of Court first being had Payette-Boise Water Users' Association, a corporation, files its complaint in intervention, and for ground of complaint alleges and states:

I. That at all times herein mentioned plaintiff was and is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho with its principal place of business at Caldwell, Idaho.

[fol. 99] II. That plaintiff is interested and affected by the controversy involved in said cause, and is a necessary and indispensable party to the final determination of said cause for the reasons herein-after stated.

III. That on or about the 13th day of February, 1906, plaintiff herein entered into a certain contract with the Government of the United States, a copy of which marked Exhibit "A" is hereto attached and made a part hereof.

IV. That under and by vir-ue of the terms of said contract, intervenor for and on behalf of its members contracted and agreed with the United States for the construction of the irrigation works known as the Boise Project, covering approximately 143,000 acres of land within Ada and Canyon Counties, State of Idaho; that of said 143,000 acres approximately 40,000 acres of which lie within the Nampa & Meridian Irrigation District, plaintiff in this cause, and that said 40,000 acres is identical in description with the 40,000 acres described in paragraph 4 of the complaint on file herein.

V. That under and by virtue of said contract of February 13, 1906, [fol. 100] intervenor herein became guarantor for the return of the construction charge of the United States of America of the moneys expended and to be expended by the Government of the United States in the construction of the Boise Project under and by virtue of the terms of said contract; that said Boise Project in pursuance of said contract was by the Secretary of the Interior, acting by the United States, duly constructed.

VI. That the members of intervenor are the settlers and land owners upon said Boise Valley Project; that the stockholders and mem-

bers of this plaintiff have procured all their rights to the use of water from said Government Project under and by virtue of the contracts and decree of Court herein referred to between this plaintiff and the Government of the United States.

VII. That plaintiff's members and stockholders comprise approximately 2,000 settlers upon what is known as the Boise Project and land owners thereunder.

VIII. That certain litigation arose between this plaintiff and certain officers of the Reclamation Service, and that in settlement of said controversy that a certain contract between the plaintiff herein and the Government of the United States, bearing date of the 12th day of July, 1921, was entered into; that among other things under [fol. 101] and by virtue of the terms of said contract being referred to as a supplemental contract, intervenor herein became the guarantor of all payments provided for to be made by the settlers upon the Boise Project to the United States under and by virtue of said supplemental contract; that large sums of money under the terms of said contract have been collected from the various members of plaintiff herein for a drainage construction, and a large sum of which has been expended in the construction of drainage works.

IX. That under and by virtue of the contract of June 1, 1915, Exhibit "A" to plaintiff's complaint between the Nampa & Meridian Irrigation District and the United States of America, said Nampa Irrigation District contracted and agreed to pay the same maintenance and operation charge per acre as announced by the Secretary of the Interior for similar lands upon the Boise Project proper; that drainage is a proper and necessary maintenance charge in that a large acreage upon the Boise Project is rapidly becoming water-logged and seeped so that without drainage a large acreage of said Project will become permanently water-logged and seeped, and the productivity of the land destroyed, and that said seeped and water-logged land cannot return to the Government of the United States a proper or any construction charge.

[fol. 102] X. That under and by virtue of said contract, Exhibit "A" to plaintiff's complaint, a large sum of money was charged against the Boise Project outside of the Nampa & Meridian Irrigation District, and for which lands outside of the Nampa & Meridian Irrigation District are paying and have been paying for drainage within the Nampa & Meridian Irrigation District.

XI. That it is inequitable to permit the Nampa & Meridian Irrigation District to receive and retain such benefits to the expense of the Project lands outside of the Nampa & Meridian Irrigation District, which it is doing and has done, and avoid contribution to the expense of the drainage on Project lands outside of the said district.

XII. That a large majority of the settlers, members of this intervenor, have executed the new form of water right application provided for in said supplemental contract between the United States

of America and this intervenor, bearing date of the 12th day of July, 1921, wherein and whereby the members of this intervenor, relying upon the provisions of said contract to the effect that the United States of America would assess for drainage purposes all of the project lands within the Nampa & Meridian Irrigation District [fol. 103] equally and ratably with that of the lands outside of the irrigation district for drainage purposes belonging to the members of this intervenor, so executed said form of water right application in which it is provided, among other things, that the members of this intervenor would pay a drainage charge as levied by the Secretary of the Interior.

And for other and further defense to plaintiff's complaint, intervenor alleges and states:

I. That plaintiff's complaint does not state facts sufficient to constitute a cause of action or to entitle plaintiff to equitable relief or any relief, and for that reason and upon that ground intervenor moves to dismiss plaintiff's complaint in said cause.

II. That the United States of America is a necessary and indispensable party to this proceeding, in that by this action it is sought to abrogate a contract made with the United States of America, and is not a proceeding to prevent the violation of a contract made by the United States, and for that reason and upon that ground, intervenor further moves the Court to dismiss plaintiff's cause of action.

III. That a copy of said supplemental contract, bearing date of the 12th day of July, 1921, between the United States of America [fol. 104] and this intervenor, marked Exhibit "B," is heretofore attached and made a part hereof; that said contract was made for and on behalf of the members of this plaintiff.

Wherefore, Intervenor prays judgment, that:

- A. That plaintiff's cause of action be dismissed.
- B. That intervenor have judgment for its costs in this behalf expended.
- C. That intervenor have such other and further relief as may appear equitable and just in the premises.

Eldredge & Morgan, Attorneys for Intervenor. Residing at  
Boise, Idaho.

(Duly verified.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT  
OF IDAHO, SOUTHERN DIVISION

PAYETTE-BOISE WATER USERS' ASSOCIATION, Plaintiff,

vs.

D. W. COLE, C. C. FISHER, CHAS. F. WEINKAUF, RIVERSIDE IRRIGATION District, Pioneer Irrigation District, and Nampa & Meridian Irrigation District, Defendants.

STATEMENT OF COST AND CONDITIONAL DEDICATION OF IRRIGATION WORKS, BOISE IRRIGATION PROJECT, IDAHO—Lodged Dec. 15, 1922; filed Dec. 16, 1922

[fol. 105] To the Above Named Court:

The following statement of Cost and Conditional Dedication of Irrigation Works, in connection with the Boise Federal Irrigation Project, in Idaho, is presented for filing in the above-named case;

Statement of Case

Gross Cost:

Gross cost of construction of the Project to June 30, 1919 .....	\$12,696,331.87
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NOTE.—This figure is taken from project books; in arriving at same, the cost of equipment and plant was not charged but depreciation only was charged. Receipts from sale and transfer of equipment in excess of appraised values at completion of work were credited to cost. A detailed statement of cost to June 30, 1917, has been furnished as Defendants' Exhibit No. 54. Any additional information desired in regard to items or feature costs may be ascertained by reference to the project books which have been offered in evidence and are available in the Boise Project office. The difference between the cost to June 30, 1917, as shown in Defendants' Exhibit No. 54 and the gross cost to June 30, 1919, as stated above, is nearly all covered by items, no part of which is charged to the project lands, i. e., Riverside Drainage \$91,821.44 and Notus Canal \$121,523.44.

Equipment:

Add amount carried as value of equipment undisposed of and adjustments on account of sales at less than appraised value .....	35,816.69
	<hr/> \$12,732,148.56

## [fol. 106] Construction Credits:

Deduct construction credits, other than power receipts (power receipts are credited to the power plant which is reserved and is not charged to project lands) .....	725,424.59
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	\$12,006,723.97
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## Over-distribution operating accounts:

Deduct over-distribution on operating accounts...	1,201.42
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Net construction cost .....	12,005,522.55
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## Surveys and investigations:

Deduct surveys and investigations on unconstructed units, itemized below .....	43,783.36
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	\$11,961,739.19
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Storage on Weiser River .....	\$918.96
SNAKE and COLUMBIA RIVERS .....	82.81
Reconnaissance on Wood River ....	168.95
Storage reconnaissance on Payette..	267.44
Succor Creek reconnaissance .....	214.63
Miscellaneous preliminary expenses	188.30
North Side Boise surveys .....	5,494.15
Payette Unit surveys .....	10,600.23
Succor Creek tract surveys .....	1,080.15
Stream measurement Payette River	2,169.13
Stream measurement Succor Creek.	1,097.89
[fol. 107] Water filings, Payette River .....	450.90

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Subtotal .....	\$22,733.54
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Surveys proposed extensions on North and South Sides Boise River in 1916 .....	21,049.82
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	\$43,783.36
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## Arrowrock Reservoir:

Cost of Arrowrock Reservoir .....	\$4,601,183.82
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NOTE.—Difference between \$4,601,183.82 and \$4,750,000 referred to in public notice of July 2, 1917, is due to the fact that the equipment and construction plant were disposed of to better advantage than estimated at the time of public notice, and that the credit for certain construction earnings, such as profit on mercantile store and



mess at Arrowrock has been transferred to the Arrowrock feature, making it possible to reduce the net cost of the reservoir to \$4,601,183.82.

Net cost, excluding Arrowrock Reservoir:

Net cost of project, excluding Arrowrock Reservoir .....	\$7,360,555.37
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Drainage Construction:

Above figures include following items for drainage construction, part of which is chargeable to project land, and part paid by irrigation districts:

Pioneer Irrigation District .....	\$298,397.63
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Nampa & Meridian Irrigation District:

Old water right lands, .....	\$151,206.38	
Project lands .....	158,139.56	

\$309,345.94

[fol. 108] Riverside Irrigation District .....	91,821.44
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Drainage on project proper outside of districts, mainly Fargo Basin and Deer Flat.....	77,189.43
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Subtotal drainage .....	\$776,754.44
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NOTE.—Proportion of drainage construction to be charged to project lands consists of the \$77,189.43 drainage on project proper and the item of \$158,139.56 in the Nampa & Meridian Irrigation District, being the proportionate charge to project lands as agreed to in contract dated June 1, 1915 between the U. S. the Nampa & Meridian Irrigation District and the Payette-Boise Water Users' Association.

Total Drainage construction charged to project lands .....	\$235,328.99
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Drainage cost to be collected from districts and not charged to project lands:

Pioneer District .....	\$298,397.63
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Nampa & Meridian District old lands .....	151,206.38
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Riverside Irrigation District lands.	91,821.44
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Total drainage deduction ..	\$541,425.45
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\$6,819,129.92

## Notus Canal:

Deduct cost of work on Notus Canal to July 1, 1919 .....	121,523.44
	<hr/> \$6,697,606.48

## Power Plant:

Deduct value of power plant at Boise Diversion Dam reserved for pumping water to proposed extensions .....	195,305.27
	<hr/> \$6,502,301.21

## [fol. 109] Deer Flat Reservoir:

Deduct 2% of Deer Flat Reservoir reserved to supplement water supply of Notus sub-unit extension, (2% about \$1,000,000) approximately .....	20,000.00
	<hr/> \$6,482,301.21

## Main Canal:

Deduct 1% of cost of Main Canal from Boise River to Deer Flat Reservoir (1% of \$2,000,000) approximately .....	20,000.00
	<hr/> \$6,462,301.21

## Suit in Court of Claims:

Add contingent liability in suit of Contractor in Court of Claims, Page and Brinton v. United States .....	325,931.97
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## Net Cost, exclusive of Arrowrock Storage:

Net cost to be charged to project lands exclusive of Arrowrock storage .....	\$6,788,233.18
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## Irrigable Area:

Maximum possible irrigable area of new or project lands under the constructed unit, about .....	140,000 acres.
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NOTES.—The term "project lands" as used herein refers to lands under the constructed unit of the project and having no water rights from private canals, as distinguished from old water right lands having a partial water supply from private canals for which supplemental storage rights have been contracted under agreements between the various irrigation districts and canal companies, and the United States. Of the 140,000 acres of project land above referred to, about [fol. 110] 40,000 acres are located in the Nampa & Meridian Irrigation District, and about 400 acres in the Settlers' Irrigation District.

In the past year about 1,500 acres of sandy, rough land have been

deducted as not practicable for irrigation, also 1,500 acres which have become seeped. The 140,000 acres referred to above includes about 8,000 acres of extremely rough, sandy land which it is doubtful whether it is practicable to irrigate, also a considerable area of land which will probably become non-irrigable on account of seepage, also lands held by owners not qualified to secure government water rights under the act on account of non-residence and excess ownership. Loss in acreage of from 10 to 25% on account of seepage has been common on other projects. How much of the seeped area can be reclaimed by drainage is uncertain. It is also uncertain whether any funds will be available for the construction of drainage works, and also as to the effectiveness of drainage works, when constructed and what lands will remain seeped after drainage construction.

Estimated acreage which will ultimately be found unsuitable for irrigation on account of the sandy and rough condition of certain lands and the seepage of other lands .....	10,000 acres.
Estimated net acreage of irrigable project lands under the canal system of the constructed unit	130,000 acres.
Cost per acre of works, other than Arrowrock reservoir, chargeable to project lands if payments are [fol. 111] secured from the entire 130,000 acres. .	\$52.22
50% of Arrowrock reservoir to be charged to project lands (50% of \$4,601,183.82) \$2,300,591.91 or a charge per acre, if payments are made from the entire 130,000 acres of .....	17.70
Charge per acre, provided all project lands are covered by contracts through organization of irrigation districts or otherwise, approximately.	\$70.00

#### Explanatory Statement:

Unless irrigation districts or some form of organization capable of binding all the lands should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual land owners. Without district organizations binding all lands, it is estimated that a considerable percentage of the land owners will avoid paying the government for a water right by picking up waste water, or securing water in some other way or holding the land for speculation without irrigation. Consequently, it is estimated that a charge of approximately \$70 per acre will be necessary if districts are organized and contracts made, binding all irrigable project lands to pay for a water right, and a charge of \$80 per acre without such organization. That is, it is estimated that a payment of \$70 per acre from all project lands guaranteed by an irrigation district having the taxing [fol. 112] power enabling it to assess all the lands would bring in a total revenue or payment equal to the amount which would be collected by a charge of \$80 per acre upon such of the project

lands as the owners thereof may elect to purchase water rights for.

Estimating the available capacity of Arrowrock Reservoir at about 268,000 acre-feet (approximately the amount of stored water drawn out of Arrowrock during the irrigation season of 1919), the storage capacity of Arrowrock Reservoir to be dedicated to the project lands of the constructed unit would be 134,000 acre-feet, and estimating that about  $\frac{2}{3}$  of the 130,000 acres of project lands is located above Deer Flat Reservoir and will be supplied with water from Arrowrock Reservoir, and about  $\frac{1}{3}$  is located below Deer Flat Reservoir and is supplied from Deer Flat Reservoir, the amount of Arrowrock storage capacity dedicated to the project lands supplied therefrom amounts to about  $1\frac{1}{2}$  acre-feet per acre reservoir capacity, provided water rights are purchased for the entire area.

Approximately 58,000 acre-feet have been sold to supplement the water rights on the old lands of the Boise Valley under the canals of the several irrigation districts and companies with which contracts have been made, including the lands of the shareholders of the New York Canal Co. The balance amounting to about 76,000 acre-feet is reserved for future sales and proposed extensions of the [fol. 113] project. If the members of the Payette-Boise Water Users' Association desire a larger proportion of the Arrowrock Reservoir and are willing to pay for same, an application to purchase a right to the use of additional capacity out of the reservoir will be considered if an acceptable application for the same is made prior to the sale or dedication of the water to other lands.

The figure for cost in above statement includes a proportion of cost of detached or general office prorated to the various features on the basis of cost to each feature. The amount and details of such overhead cost to June 30, 1917, are shown in statement introduced in the trial of this case as Defendants' Exhibit 55. The cost of general offices is proportioned to all projects monthly by transfer, debiting all projects under way, and crediting the general office accounts. The basis of distribution is the ratio each project expenditure for the month bears to the total expenditure for the whole service for the same period. Secondary projects, or those on which investigations only are being made, received their proportion of overhead which remains a part of the cost of such investigations.

About three-fourths of the overhead cost of the Boise Project is charged to the portion of the works dedicated to the project lands of the constructed unit. The greater part of the overhead expense [fol. 114] shown on Exhibit No. 55 is the expense of the Boise Project office and consists of work done on the Boise Project directly and exclusively for the benefit of that project. The Supervising Engineer's office was also located on the Boise Project and handled engineering and advisory work for that project. The Chicago office was a transportation and central purchasing office. Much of the time of that office was taken up in making purchases and forwarding shipments for the Boise Project. In 1915, the employment of Supervising Engineers was discontinued and thereafter the work previously handled by the Supervising Engineers was

concentrated in the office of the Chief of Construction at the Denver office and is referred to in Exhibit No. 55 as the Denver Office Expense. The Washington office handled engineering, legal, clerical, accounting, correspondence, and general office work for each of the various projects of the Reclamation Service. The method of prorating the expenses of the detached offices at Washington, Denver and Chicago, to the several projects in proportion to the total expenditures of each project, was adopted as the most practical and economical method of distribution and one giving results not differing greatly from what would have been obtained by keeping track of the times of each employee devoted to each item of work for each of the several projects, the latter method, while possible, would have been very expensive and cumbersome. General administrative work carried on in the office of the Secretary of the Interior has not been charged to any project.

### Conditional Dedication of Irrigation Works

Subject to the payment of charges and compliance with regulations as required by law and authorized regulations of the Secretary of the Interior, and insofar as the dedication of irrigation works owned by the United States and not yet paid for by the Water Users is authorized by law, the following irrigation works are dedicated to the said project lands in the constructed unit, including the project lands in the Nampa & Meridian Irrigation District:

(a) Right to the use of 50% of the storage capacity of Arrowrock Reservoir.

The said project lands to be entitled to 50% of the water actually available from said reservoir each year.

(b) Right to the use of all of the distribution system, except the power plant and Notus Canal and 1% of the main canal.

(c) Right to the use of 98% of storage capacity of Deer Flat Reservoir.

It is understood, however, that pursuant to the provisions of Sec. 6 of the Act of Aug. 13, 1914, (38 Stat., 686) no land owner or water user shall be entitled to receive water when in arrears for more than one year in the payment of any construction or operation and maintenance charge.

[fol. 116] The said project lands of the constructed unit are not paying for any part of the 50% of Arrowrock Reservoir not dedicated to said project lands and shall have no right, title or interest to the said 50% or the water available therefrom, nor the 2% of the Deer Flat Reservoir reserved to supplement the supply of water for land under the Notus Canal.

The power plant at the Diversion Dam is reserved and not charged or dedicated to the project lands and the project lands shall have no interest therein.

Pursuant to Sec. 6 of the Reclamation Act of June 17, 1902, (32 Stat., 388), title to all irrigation works remains in the United States until further Act of Congress, and the management and operation of the irrigation works will remain in the United States until payments have been completed for the major portion of the lands irrigated by the waters of said works unless prior to said time the operation and maintenance thereof shall be turned over to the water users by the Secretary of the Interior pursuant to an agreement therefor under the provisions of Sec. 5 of the Act of Congress approved Aug. 13, 1914 (38 Stat., 686).

The right to enlarge any of the existing irrigation works of the project and to use or dispose of any additional capacity made available by any enlargement or improvement hereafter constructed by the United States is reserved.

[fol. 117] Under the contract between the United States and the Pioneer Irrigation District the United States has the right to substitute water from Deer Flat Reservoir or other source of supply under the control of the United States in lieu of an equal amount of Arrowrock water to which the district is entitled. As there is more storage capacity in Deer Flat Reservoir in proportion to the acreage to be served than in Arrowrock Reservoir, such substitution may be desirable at times and the right to make such substitution is reserved. In the event of such use of Deer Flat water the Arrowrock water for which such Deer Flat water is substituted will be available for the project lands.

This dedication is made for the purpose of compliance with opinion and decision of the Court in the above entitled case, and should the said decision be reversed or modified by the final decision of the Supreme Court or Circuit Court of Appeals in said case, the Secretary of the Interior reserves the right to cancel or withdraw the said dedication and terminate all rights provided thereunder and in that event to proceed as may be lawful or proper in accordance with the determination of the Supreme Court or other appellate court rendering a final decision in said case.

Recommended for approval.

(Sgd.) A. P. Davis, Director and Chief Engineer U. S. Reclamation Service.

[fol. 118] Approved Oct. 24, 1919.

(Sgd.) Franklin K. Lane, Secretary of the Interior.

(Order)

Approved with instructions to Clerk to incorporate in record on appeal.

Frank S. Dietrich, Judge.

[File endorsement omitted.]

## IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

PRÆCIPE FOR TRANSCRIPT ON APPEAL—Filed Dec. 4, 1922

To W. D. McReynolds, Clerk of the Above-entitled Court:

You will please prepare the record on the appeal of the Plaintiff and Appellant, Nampa & Meridian Irrigation District, taken in the above entitled cause from the decree and order made and entered in said cause on the 25th day of October, 1922, such record to consist of the pleadings, documents and papers in the following order:

1. Bill of Complaint.

2. Motion of Defendant to Dismiss Bill of Complaint.

[fol. 119] 3. Decision of the Court on Motion to Dismiss Complaint Filed August 22, 1922.

4. Decree of the Court Dismissing Complaint and Action Filed October 25, 1922.

5. All papers filed in connection with this appeal, viz.: Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Bond on Appeal, Citation, and this Præcipe.

In preparing the above record you will please omit the title of all pleadings except Bill of Complaint, but in lieu thereof insert the words "Title of Court and Cause," to be followed by the name of the pleading or instrument. You will also please omit the verification of all pleadings, but in lieu thereof insert, whenever the pleading is verified, the words, "Duly Verified."

We have conferred with counsel for appellees and he requests us to advise you that he waives the time allowed him in which to designate additional parts of the record for inclusion in the printed transcript, and consents that the same may be printed forthwith and in accordance with the foregoing Præcipe.

Dated this 27th day of November, 1922.

Hugh E. McElroy, Solicitor for Complainant and Appellant.  
Boise, Idaho, November 27, 1922.

We hereby acknowledge receipt and service of copies of the foregoing Præcipe for Transcript on appeal and waive time to designate [fol. 120] additional parts of the record for inclusion in the printed transcript and consent that the same may be printed forthwith and in accordance with the foregoing Præcipe.

Dated this 27th day of November, 1922.

E. G. Davis, B. E. Stoutemyer, Solicitors for the Defendant.  
Boise, Idaho, November 28, 1922.



We hereby acknowledge receipt and service of the foregoing Præcipe on Appeal by copy, reserving all rights as to time and to ask for further record.

Eldrege & Morgan, Solicitors for Intervenor.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

CITATION—Omitted in printing

[fol. 121] Service of the foregoing citation and receipt of copy thereof admitted his 28th day of November, 1922.

B. E. Stoutemyer, Solicitor for Defendant. Eldredge & Morgan, Solicitors for Intervenor.

[File endorsement omitted.]

[fol. 122] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 122, inclusive, to be full, true and correct copies of pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Præcipes for such transcript and directed by order of the Court.

I further certify that the cost of the record herein amounts to the sum of \$141.25 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this third day of January, 1923.

W. D. McReynolds, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 122½] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

[fol. 123] ORDER OF SUBMISSION

Ordered appeal in the above-entitled cause argued by Mr. Hugh E. McElroy, counsel for the appellant, and by Mr. B. E. Stoute-

myer, District Counsel, U. S. Reclamation Service, counsel for the appellee J. B. Bond, and by Mr. J. B. Eldridge, counsel for appellee, Payette-Boise Water Users' Association, Ltd., and submitted to the Court for consideration and decision.

[fol. 124] Present: Honorable William H. Hunt, Circuit Judge, Presiding; Honorable William W. Morrow, Circuit Judge; Honorable Frank H. Rudkin, Circuit Judge.

#### ORDER FILING OPINION DECREE

By direction of the Honorable William B. Gilbert and Frank H. Rudkin, Circuit Judges, and the Honorable William C. Van Fleet, District Judge, — whom the causes were heard, Ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a decree be filed, and recorded in the Minutes of this Court in each of the causes in accordance with the opinion filed therein: \* \* \*

[Title omitted.]

---

[fol. 125] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

OPINION—Filed April 12, 1923

Before Gilbert and Rudkin, Circuit Judges, and Van Fleet, District Judge

Section 4 of the Reclamation Act of June 17, 1902, (32 Stat. 388) provides:

"That upon the determination by the Secretary of the Interior that [fol. 126] any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of acre per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence."

Section 4 of the Amendatory Act of August 13, 1914, (38 Stat. 687), provides:

"That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increase charge shall become subject thereto. Such increase charges shall be added to the construction charge and payment thereof distributed over the remaining unpaid installments of construction charges."

Section 5 of the latter Act provides further:

[fol. 127] "That in addition to the construction charge, every water-right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered."

The plaintiff in this suit is an irrigation district organized under the general laws of the State of Idaho. A part of the land in the district has a water right, or partial water right, from the district, or from other private sources, while other irrigable land in the district has no such water right. The former are classed as old water right lands, and the latter as project lands. On the first day of June, 1915, the plaintiff entered into a contract with the United States to provide a drainage system for the district and to procure additional water. Under the terms of this contract the Government agreed to construct the drainage system at a cost of \$557,000, a fixed proportion of which was charged against the old water right lands, and the balance against the project lands of the Boise Project, both within and without the district. Paragraph 12 of this contract contains the following provision:

"The project lands in the district shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project and the same shall be collected by the District for the United States and paid over by the District to the United States, and upon notices from the officer of the [fol. 128] United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge."

On the 15th day of February, 1921, the Secretary of the Interior made public announcement of the annual operation and maintenance charge for drainage in the Boise Project for the irrigation season of 1921, fixing the charge for maintenance and operation as follows:

"(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.

"(b) A special operation and maintenance charge for drainage purposes of One Dollar (\$1.00) per irrigable acre per year until further notice, to become due and payable Fifty (50c.) cents per irrigable acre on April 1, 1921, and Fifty (50c.) cents per irrigable acre on October 1, 1921, and Fifty (50c.) cents per irrigable acre on March 1st and October 1st of each year thereafter until further notice, the money received from such special operation and maintenance charge to be used after the same has been paid in to the United States, in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and waterlogging of the lower lying lands of the project by seepage from the irrigation of the higher lands and by seepage from the irrigation system of the project, to lessen the damage which would otherwise result from the operation of said canal system and to maintain the irrigability of the lands of the project, said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the remainder [fol. 129] of said minimum charge per acre and all charges per acre-foot of water used in excess of the amounts of water allowed for such minimum charge to be hereafter announced and determined by Public Notices to be hereafter issued from time to time."

The present suit was instituted by the District to restrain the Project Manager from withholding the delivery of water for failure to pay the charge for operation and maintenance as announced by the Secretary of the Interior. The court below sustained a motion to dismiss, and from the final decree the plaintiff has appealed.

RUDKIN, Circuit Judge (after stating the facts as above):

While conceding that the Secretary of the Interior has authority to provide for drainage under the Reclamation Act, the appellant insists that such provision must be made as a part of the original construction cost, or by agreement with a majority of the landowners affected under the Act of 1914, and that the cost of drainage cannot be included in the maintenance and operation charge. The appellee, on the other hand, contends that it is a proper maintenance and operation charge, and that, in any event, under the terms of its contract with the United States, the appellant is bound by the act of the Secretary in fixing the maintenance and operation charge for the Boise Project. There is force in this latter contention, but we prefer to rest our decision on broader grounds. While indefinite, the term operating expense is a broad and comprehensive one, and its meaning in a given case depends on the nature and amount of the expenditure, and all the surrounding circumstances. As said by the court in [fol. 130] *Schmidt v. Louisville C. & L. Ry. C.*, 84 S. W. 314, 318; "There is no rule of law declaring what constitutes operation expenses. That is to be determined by the testimony as to each item of expenditure. It is a matter of evidence, and determinable like any other fact."

The situation confronting the Reclamation Service was this: The necessity for drainage follows irrigation on an extensive scale almost as a matter of course. It cannot be determined in advance with any

degree of certain when drainage will be required, or its cost or extent when required. If not provided for in advance, as was the case here, it can only be provided for by agreement with a majority of the land-owners affected, or by a maintenance and operation charge. The prosecution of the present suit gives little promise that the necessary consent could be obtained, but the power of the Secretary to conserve and protect the property under his charge is not dependent upon any such consent. It has been almost universally held that damages to person or property resulting from operation is a proper operating expense, and had injury resulted to crops or other property from the operation of this system, compensation for such injury would fall within the most restricted meaning of that term. Furthermore, the power of the Secretary does not stop at reparation for past injuries. It extends to the prevention of future injuries as well, and if, in the exercise of the broad discretion vested in him, the Secretary deems it advisable to incur expense to prevent future losses rather than make reparation after the losses have been incurred, a court of equity will [fol. 131] not review his discretion. In other words, the expense of preventing injury by seepage resulting from operation is a proper operation charge, or, at least, the determination of the Secretary of the Interior to that effect is controlling upon the courts.

The decree of the court below is, therefore, affirmed.

[File endorsement omitted.]

---

[fol. 132] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT

[Title omitted]

Appeal from the District Court of the United States for the District  
of Idaho, Southern Division

DECREE—Filed April 2, 1923

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Southern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 133] IN U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Honorable William B. Gilbert, and Frank H. Rudkin, Circuit Judges, and the Honorable William C. Van Fleet, District Judge, before whom the case was heard, it is ordered that the Petition, filed May 1, 1923, on behalf of the appellant for a rehearing of the above-entitled case be, and hereby is denied.

---

[fol. 134] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ORDER STAYING MANDATE—Filed May 21, 1923

Upon application of Mr. Hugh E. McElroy, counsel for the appellant, and good cause therefor appearing, ordered mandate under Rule 32 in the above entitled cause stayed to and including June 4, 1923.

Dated: San Francisco, California, May 21, 1923.

Wm. B. Gilbert, United States Circuit Judge.

[File endorsement omitted.]

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[fol. 135] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed June 4, 1923

To the above-named Court or any Judge thereof:

Now comes the Appellant, Nampa & Meridian Irrigation District, by its solicitor, and complains that in the record and proceedings and also in the rendition of the decree of the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco in the State of California, in the above entitled and numbered cause on the second day of April, 1923, affirming the decree of the District Court of the United States for the State of Idaho, in said cause, manifest error has intervened to the great damage of Petitioner; that the jurisdiction of the District Court of the United States for the State of Idaho depended upon the fact that said proceedings involved federal questions, to-wit: The interpretation and construction of Sections 4 and

5 of the Act of Congress of August 13, 1914, (38 Stat. 687), commonly known as the Reclamation Extension Act and also the interpretation and construction of a certain contract between the United States of America and the appellant; that the amount involved therein and the matter in controversy exceeds the sum of \$1,000, besides costs. This is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore petitioner prays for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and Petitioner prays for such process as is required to perfect the appeal prayed for, to the end *and* that the error therein may be corrected.

Hugh E. McElroy, Solicitor for Appellant, Residing at Boise, Idaho.

Appeal is allowed and bond fixed in the sum of \$250.00, conditioned as the law directs, this 4th day of June, 1923.

Fk. H. Rudkin, United States Circuit Judge.

[File endorsement omitted.]

[fol. 136] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE NINTH DISTRICT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 4, 1923

The Appellant files the following Assignment of Errors upon which it will rely upon its prosecution of its appeal from its decree made April 3, 1923, affirming the judgment of the District Court, and its order denying petition for rehearing, made May 14, 1923, to the Supreme Court of the United States:

First. That the District Court erred in allowing the motion of the Appellee, J. B. Bond, Project Manager, for dismissal of the Bill of Complaint and making its Order and Decree dismissing the same, and the Appellate Court erred in affirming said Order and Decree since the Bill of Complaint states a claim for equitable relief of Dismissal for the following reasons:

(a) That it appears therefrom that the cost of the proposed drainage works, referred to in paragraph 10 thereof, did not constitute a part of the operation or maintenance charges of the Boise Project, under section 5 of the Act of Congress approved August 13, 1914, (38 Stat. 686), commonly known as the Reclamation Extension Act, or at all, or under the terms of paragraph 12 of Appellant's contract with the United States, attached to the Bill of Complaint as Exhibit "A" and appellant was not liable for any part thereof.



(b) That it appears from the Bill of Complaint that the cost of the proposed drainage works is properly a construction charge of said Boise Project, governed by Section 4 of said Reclamation Extension Act and that Appellant is not liable therefor under its contract.

(c) That it appears from the Bill of Complaint that the character of the cost of said drainage works as a construction charge, can only be disputed as an issue of fact, made by Answer and determined by competent testimony as a matter of evidence and cannot be determined as a question of law.

(d) That it appears from the Bill of Complaint that the Hon. Secretary of the Interior has charged the cost of the proposed drainage works to Appellant at a flat rate per acre instead of making said charge "for each acre-foot of water delivered" as required for operation and maintenance charges in Section 5 of said Reclamation Extension Act; and has made said charge as a continuing charge and not as an annual charge, determined as a pro rata share.

[fol. 137] (e) That the proposed drainage works are entirely outside of said Appellant district and will not benefit its lands. That under the construction placed upon said contract by the trial and appellate Courts, said contract is ultra vires and void, since Appellant is a public corporation governed by the laws of Idaho and can only secure funds for taxation by tax levies on land made in the manner and for the purposes permitted by law. That said laws will not permit Appellant to levy taxes except on the basis of benefits received. That under said laws as construed by the Courts, the construction of drainage works constitutes a construction charge and must be voluntarily authorized by the Board of Directors and a two-thirds vote of the electors of the District. That Appellant has no jurisdiction to levy taxes for or to construct drainage works except for the drainage of lands within its boundaries.

Wherefore, appellant prays that said decree be reversed and that such further proceedings may be had in said Circuit Court of Appeals and District Court as may be authorized by law and the rules of procedure governing the disposition of equitable cases.

Hugh E. McElroy, Solicitor for Complainant. Residence: Boise, Idaho.

[File endorsement omitted.]

---

[fols. 138 & 139] UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE NINTH CIRCUIT

[Title omitted]

BOND ON APPEAL FOR \$250—Filed and approved June 4, 1923;  
omitted in printing

[fol. 140] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT

No. 3967

[Title omitted]

PRÆCIPE FOR TRANSCRIPT ON APPEAL—Filed June 22, 1923

To Frank D. Monekton, Clerk of above entitled Court:

You will please prepare the record on the appeal of the Nampa & Meridian Irrigation District, to the Supreme Court of the United States, taken in the above entitled cause from the decree and order made and entered in the above Court affirming the Judgment of the District Court said decree entered on the second day of April, 1923, and said appeal allowed on or about June 4, 1923. Such record to consist of the complete transcript filed in the above-entitled court on appeal from the District Court of Idaho, together with the decision and opinion of the Court filed April 2, 1923, and the order and decree of the Court affirming the decree of the District Court. Also all papers filed in connection with this appeal, particularly as follows:

Petition for appeal, assignment of errors, order allowing appeal, bond on appeal, citation, and this præcipe, and all other files in said proceeding necessary for the review of the decree of the said Court on appeal to the Supreme Court.

Dated this 20th day of June, 1923.

Hugh E. McElroy, Solicitor for Complainant and Appellant.  
Boise, Idaho, June 20, 1923.

We hereby acknowledge receipt and service of copies of the foregoing præcipe for transcript on appeal and consent that the same may be certified forthwith under the foregoing præcipe.

E. G. Davis, U. S. Dist. Atty.; B. E. Stoutemyer, District Counsel, Solicitors for the Appellee J. B. Bond, Project Manager of Boise Project of the United States Reclamation Service. Boise, Idaho, June 20, 1923.

We hereby acknowledge receipt and service of the foregoing præcipe on appeal by copy.

Eldredge & Morgan, Solicitors for Appellee and Intervenor  
Payette-Boise Water Users' Association, Ltd.

[File endorsement omitted.]

[fol. 141] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT

[Title omitted]

CLERK'S CERTIFICATE

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and forty (140) pages, numbered from and including 1 to and including 140, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to praeipect of counsel for the appellant, filed June 22, 1923, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of June, A. D. 1923.

F. D. Monckton, Clerk, By Paul D. O'Brien, Deputy Clerk.  
(Seal of United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 142] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE NINTH CIRCUIT

[Title omitted]

CITATION ON APPEAL—Omitted in printing

[fol. 143] Boise, Idaho, June 15, 1923.

We hereby acknowledge service by copy of the Annexed Citation, this 15th day of June, at Boise, Idaho.

E. G. Davis, B. E. Stoutemyer, Solicitors for the Appellee  
J. B. Bond, Project Manager of Boise Project, of the United  
States Reclamation Service. Eldridge & Morgan, Solicitors  
for the Appellee Payette-Boise Water Users' Association,  
Ltd.

[fol. 144] [Endorsed:] Docketed. In the United States Circuit Court of Appeals for the Ninth Circuit. Nampa & Meridian Irrigation District, Appellant, vs. J. B. Bond, Project Manager of Boise Project of the United States Reclamation Service, Defendant; Payette-Boise Water Users' Association, Ltd., Intervenor, Appellees. In Equity. No. 33976. Citation on Appeal. Filed Jun. 18, 1923. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

Endorsed on cover: File No. 29,783. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 473. Nampa & Meridian Irrigation District, appellant, vs. J. B. Bond, project manager of Boise project of the United States Reclamation Service, and Payette-Boise Water Users' Association, Ltd. Filed August 1st, 1923. File No. 29,783.



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REPORT OF THE COMMISSIONER  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
UNITED STATES

WILL S. KEND

Commissioner, U. S. Department of the Interior, and Executive Assistant, Bureau  
of Land Management

E. W. BURE

Executive Assistant, U. S. Department of the Interior, in charge of  
Bureau of Land Management

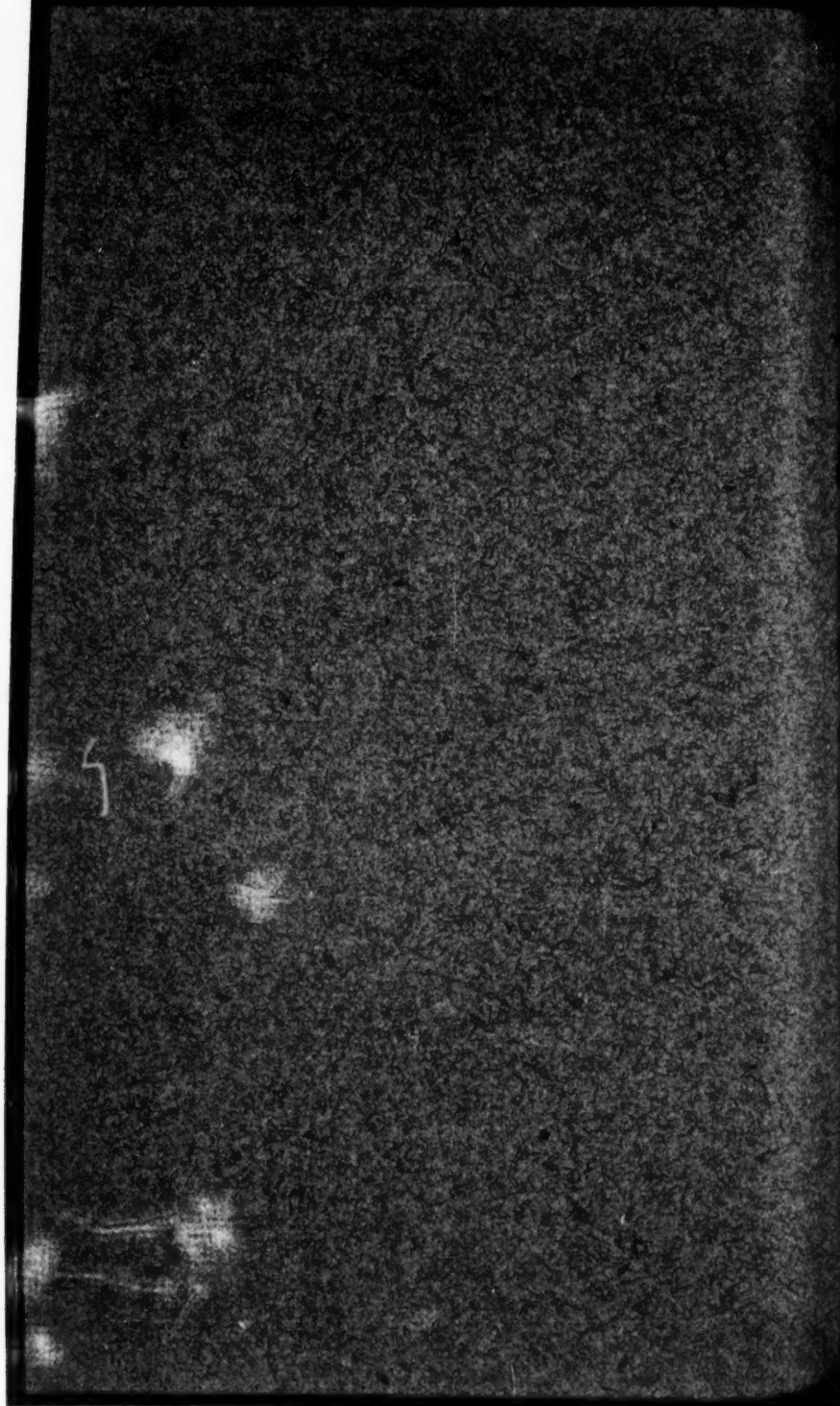
December 25, 1918

WITH AGENDA OUTLINING CHANGES MADE  
IN THE 1918 SESSION LAWS



Washington  
GOVERNMENT PRINTING OFFICE





# **HANDBOOK OF THE IRRIGATION DISTRICT LAWS OF THE SEVENTEEN WESTERN STATES OF THE UNITED STATES**

By

**WILL R. KING**

Chief Counsel, U. S. Reclamation Service, and formerly Associate Justice  
of the Oregon Supreme Court

and

**E. W. BURR**

District Counsel, U. S. Reclamation Service, in charge of  
Relations with Irrigation Districts

---

**December 20, 1918**

**WITH ADDENDA OUTLINING CHANGES MADE  
IN THE 1919 SESSION LAWS**



WASHINGTON  
GOVERNMENT PRINTING OFFICE

1920.

ADDITIONAL COPIES

OF THIS PUBLICATION MAY BE PROCURED FROM THE  
DIRECTOR, U. S. RECLAMATION SERVICE  
WASHINGTON, D. C.

AT

ONE DOLLAR PER COPY

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# HANDBOOK OF IRRIGATION DISTRICT LAWS OF THE SEVENTEEN WESTERN STATES.

## THE PUBLIC CORPORATION AS RELATED TO IRRIGATION.

Irrigation is as clearly the basic economic institution as the family is the basic social institution in large sections of the 17 Western States, which comprise about half the area of the United States. Without irrigation over extensive areas there would be but a sparse population dependent upon stock grazing, while in other sections of the same States irrigation shares in importance with the mining, lumber, and so-called dry farming industries and is in general more important and obviously a more permanent industry than the others.

*Irrigation farmer not an individualist.*—It is recognized in the arid parts of the country that farmers are the most individualistic portion of the American people. Their daily occupation provides fewer points of outside contact than that of any other part of the population. Accordingly, the farmer in humid climates has comparatively little occasion to develop the power to cooperate. This is not true, however, of the irrigation farmer. He must join forces with other prospective farmers in order to build the necessary canals, laterals, diversion dams, and other works, often including a reservoir, which are necessary before he can even begin irrigation; and hereafter he and his neighbors must cooperate in the perpetual maintenance and operation of the works.

The proper discharge of these duties assumes an importance to irrigation farmers more intimately and obviously related under all ordinary circumstances to their personal welfare than the activities of local, State, and Federal Governments combined. The failure of the irrigation system to function properly for even a brief period means the loss of all the capital and labor invested in the crop.

*Irrigation as the fundamental institution.*—Irrigation, therefore, is not only of public use and benefit and comparable in that respect with education, highways, and local government, but it is the fundamental institution in these communities, upon the cessation of which the population would so dwindle as to curtail and, in many localities, abolish other public institutions.

Hence it is peculiarly appropriate that irrigation should be carried out by means of public corporations exercising the powers of taxation and enjoying freedom from the necessity for securing the universal consent of those benefited by exercising compulsion of the minority, the power of eminent domain, public ownership, and popular control. These powers for centuries have been fundamental in Anglo-Saxon institutions performing many functions of less public necessity than that of irrigation in arid regions.

No one would think of saying to one who denied the benefits of education, "We will build the school and keep it running, and when you want to send children there you can begin paying." But it is

as illogical and pernicious to say to one denying the benefit of irrigation, "We will build the reservoir and run the ditches past your lands at our expense, and when you get ready to cultivate or when you can profitably sell, you or your successor can make a contract for water." But the private corporation or mutual association in effect lays just such a proposition before the landowners.

It would be fully as appropriate to secure individual contracts giving mortgage liens on private property for county highways or the sheriff's salary as it is to do so for irrigation canals and the water superintendent's salary.

The above conclusion needs to be stated despite its obvious truth, for the reason that the tillage of lands requiring irrigation is comparatively a recent experience to people inheriting the common law of England. The difficulty with which our race has been confronted in adjusting conditions to meet the exigencies of insufficient rainfall is clearly shown in the survival in several irrigation States of the doctrine of riparian rights, wholly unsuited to western conditions, as well as in slowness of the use of public or quasi-municipal corporations, for the construction and operation of irrigation works.

*Growth of the public corporation idea.*—The growing necessity for the largest cooperation in the construction and operation of irrigation works has constantly forced upon farmers and legislators a fuller realization of the public character of irrigation.

In the early days, when land in plenty could be secured from the Government for \$2.50 an acre and the streams still carried a supply of water ample for the few persons diverting it by simple means, there was little necessity for financial credit or a high degree of co-operation. Now, however, the summer flow of all the small streams and of such rivers as do not run in channels far below the level of the lands they travel, has been fully appropriated throughout the West, and the large feasible additional development requires the expenditure of great sums of money and the cooperation of capitalists with the owners of large areas of land.

The day of individual and partnership enterprise has long since passed and that of the private corporation and the mutual ditch company has now also gone so far as new projects are concerned. The public corporation is being recognized as practically the sole means for the construction of new irrigation projects. And, due to the large sums of money and length of time required for development, public corporations will in the main need the cooperation of the National or State Government or both.

The irrigation district is the result of the legislative application of the public municipal idea to the needs of irrigation. Properly worked out it removes numerous difficulties which cling to other forms of organization.

*Advantages of district organization.*—It is not within the scope of this discussion to argue the advantages of irrigation district organization, but a brief summary of such advantages follows:

1. The organization, financing, and operation of irrigation districts are fully under popular control.
2. This increases the sense of local civic responsibility.
3. Projects are much more rapidly organized by the holding of an election after a petition for organization than is possible where individual contracts from the landowners must be secured.

4. Examination of abstracts of title is of no importance under the district plan.

5. Complete control over the lands of the dissenting minority is secured so that all of the lands benefited are bound.

6. No profit other than interest on the bonds is paid to the creditors or for promotion.

7. The method of public assessment is applied to all lands benefited, affording priority over private mortgage liens, and the same machinery for collection as in the case of taxes.

8. The collection of the needed funds by public assessment results in a better attitude on the part of the average landowner toward the payment of the moneys required for irrigation.

9. Control is secured over public lands of the United States when entered and against unentered lands awaiting entry assessments accumulate.

10. The status of a public, or quasi-municipal corporation gives the irrigation district a much better standing in financial markets.

11. The State district laws supply the best means for cooperation with the United States under Federal reclamation laws.

12. Several States provide for exemption of taxation of irrigation district property, and others for the registration of bonds, so that they become lawful securities for the investment of State school funds and for private fiduciary moneys.

13. The laws of all the States having irrigation district laws provide for confirmation proceedings, jurisdiction over all persons being secured by publication, whereby the decree becomes conclusive upon all the world as to the organization of the district and the validity of the debts incurred.

14. The speculative feature is eliminated, landowners speculatively inclined being taxed for the cost and operation of the works, are unable profitably to "hold on."

15. The land is accordingly put into cultivation without unnecessary delay in order to make it possible to meet the assessments.

16. The project in this manner is more rapidly developed and achieves more prompt success.

*District organization not a panacea.*—In spite of these advantages it must not be imagined that the irrigation district is a panacea cure for irrigation troubles. Far from it. The present-day project is generally a large undertaking. It demands great engineering skill, intimate knowledge of soils, climate, market facilities, the possible need and cost of drainage, legal and hydrographic study of water supply and water rights, the support of the people; above all, a sound and suitable financial plan and large executive ability.

None of these will necessarily follow the mere creation of an irrigation district, which is, after all, a form of organization solely. The substance of the project must be supplied by nature and the energy, honesty, and ability of the men who build and of those who farm. Hence among irrigation failures there have been a considerable number of irrigation district failures.<sup>1</sup>

<sup>1</sup> See the able presentation of the subject "Irrigation districts in California, 1887-1915," Bulletin No. 2, State of California Department of Engineering, 1916, by Frank Adams, irrigation manager, Office of Public Roads and Rural Engineering, United States Department of Agriculture. Mr. Adams divides the irrigation districts of California prior to the amendatory act of 1897 into speculative and nonspeculative districts and asserts that no district under the California act of 1897 has failed financially. (Id., I, 114.)

The irrigation district, while not a "cure-all," is the most satisfactory method yet devised for the organization of irrigation projects involving considerable bodies of land.

*Experience of the Federal Government.*—The Federal Government, after 15 years' experience in irrigation work, through cooperation with local settlers and private and public corporations, has found that the irrigation district is the best form of local organization.

Secretary of the Interior Franklin K. Lane, in his report of July 2, 1917, to the Committee on Irrigation of the House of Representatives upon House resolution 4954, Sixty-fifth Congress, relating to irrigation districts, said:

This department has already contracted with numerous irrigation districts, and I find that cooperation with these public corporations enhances the security of the United States, gives facility in the collection of moneys due to the United States, and at the same time is popular with the water users themselves, since they have the powers and privileges of a public corporation.

Moreover, organization as irrigation districts binds to the project, irrespective of individual consent, once the statutory majority has been obtained for the formation of and making of contract, all the lands of the project, and thereby promotes early cultivation of the land and eliminates speculation. (H. Rept. No. 93, 65th Cong., 1st sess.)

Among the projects of the Federal Reclamation Service which have now, employing the State and Federal laws outlined below, substituted irrigation district organization for the former water users' associations organized under the private corporation laws of the various States, are the following: The Minidoka (Gravity unit), in Idaho; the Fort Laramie and Gering unit of the North Platte project, and several subsidiary cooperative areas in Nebraska; the Elephant Butte unit of the Rio Grande project, New Mexico; the Wiliston project, in North Dakota; the Klamath, in Oregon; the El Paso unit of the Rio Grande project, Texas; the Mapleton and Springville units of the Strawberry Valley project, Utah; and the Sunnyside, Tieton, and several subsidiary units of the Yakima project, and the Okanogan project, Washington. The Sun River, Montana; Newlands (Truckee-Carson), Nevada; and Umatilla west extension, Oregon, are now in process of organization.

*Projects not Federal.*—While the irrigation district idea is rapidly gaining in favor among the financiers and farmers, and it may be said that new irrigation development throughout the West is now being undertaken in the main through irrigation district organization, yet the area of irrigated lands under such organization is but a comparatively small portion of the total area of irrigated lands.

The laws of several of the States now make express provision for the organization of districts, not merely for construction purposes and for improvement work, but for the operation and maintenance of fully constructed projects, and the work of reorganizing as districts irrigation systems hitherto under private corporation control is under way in various parts of the West.

#### ORIGIN AND NATURE OF IRRIGATION DISTRICTS.

The irrigation district laws in their main outlines follow the parent act of California to a large extent and hence, for brevity's sake, it is deemed best to preface discussion of individual State laws with an outline of the provisions of law which are to a great degree com-

mon to the various laws, noting subsequently the most important points of divergence and other special features under the names of individual States. Incidental reference is made to the decisions of State and Federal courts, although these references are very far from a complete digest of the decisions.

*Historical.*—The honor of the pioneer in irrigation district legislation belongs partly to Utah, for it was there, in 1865, that the first law was enacted applying the public corporation principles to irrigation. (Act approved Jan. 20, 1865. See the Compiled Laws of Utah, 1876, p. 219.) This law was repealed without having been put into successful operation.

The main credit in leadership, both as to legislation and the establishment of the principle in the courts, is due to California. The Wright Act of March 7, 1887, is the parent enactment of almost all of the laws of the other 16 States which have now passed irrigation district statutes, and there are about 100 recorded decisions of the California Supreme Court and of Federal courts in suits arising in that State. This body of decisions is doubly important since, as held in the case of *McCord Mercantile Co. v. McIntyre* (138 Pac., 59; 25 Colo. App. (1914), 376), to the extent of the adoption of the law of California other States have accepted the construction placed upon the law by the California courts. The same State also led in several important amendatory acts, including the confirmation act (L. 1889, p. 212), the effect of which is outlined below, and in 1897 recodified the irrigation district law (L. 1897, p. 254). All States from and including the tier from North Dakota to Texas westward now have irrigation district laws, the North and South Dakota Legislatures having passed acts at the 1917 session.

*Corporate nature of an irrigation district.*—The identity of the legal character of an irrigation district with that of reclamation districts formed for the drainage of swamp or overflowed lands has been recognized practically from the start of irrigation district litigation. In the case of *Fallbrook Irrigation District v. Bradley* (164 U. S., p. 112), this identity was clearly recognized:

The case does not essentially differ from that of *Hagar v. Reclamation District* (111 U. S., 701), where this court held that the power of the Legislature of California to prescribe a system for reclaiming swamp lands was not inconsistent with any provision of the Federal Constitution \* \* \*.

Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case. The fact that in draining swamp lands it is a necessity to drain the lands of all owners which are similarly situated, goes only to the extent of the peculiarity of situation and kind of land (p. 103).

*Irrigation districts are public corporations.*—While there has been considerable variation in the opinions of courts as to the precise definition to apply to irrigation districts, there has been uniformity in the decisions to the effect that these corporations are public and quasi municipal in character. The *Fallbrook* case may again be cited in this connection and this suit, it may be noted in passing, was one in which exceptionally eminent counsel appeared including Benjamin Harrison, Joseph H. Choate, and John F. Dillon. The court said:

The formation of one of these irrigation districts amounts to the creation of a public corporation, and their officers are public officers. This has been held

in the Supreme Court of California. (In re Madera Irrigation District, 92 Calif., 296; People v. Selma District, 98 Calif., 206.) (Id., p. 174.)

Many of the earlier decisions in defining irrigation districts designated them municipal corporations. Such a definition, however, was found to raise constitutional questions. In Nebraska the constitution forbade the creation of municipal corporations by local boards, whereas the irrigation district law in the formation of districts purported to confer a creative authority upon county boards. It was held that these districts are public rather than municipal corporations. (Alfalfa Irr. Dist. v. Collins, 64 N. W., 1086; 46 Nebr., 411.)

The Washington constitution provided that "no county, city, town, school district, or other municipal corporation shall" incur an indebtedness in excess of 5 per cent of its taxable property. The supreme court noted that the term municipal as used in the constitution must be given a wider meaning than usual, but upheld the irrigation district law as not within the prohibition. In so holding the court pointed out that—

one of the essentials of a municipal corporation is that for the purposes for which it is organized it must affect all within its boundaries alike. A school district though organized only for the purpose of providing means and furnishing facilities for the education of its children, yet affects all the taxpayers of such district alike. The same may be said of a county.

The distinction was that the irrigation district does not equally affect all inhabitants, the real property only being assessed for a local improvement. (Board of Middle Kittitas Irr. Dist. v. Peterson, 29 Pac., 995, 996; 4 Wash., 147.)

The Idaho courts have adhered to the public corporation idea:

It is settled law that irrigation districts are public corporations although not strictly municipal in the sense of exercising governmental functions other than those connected with raising revenue to defray expenses of constructing and operating irrigation systems and the conduct of the business of the district. (Indian Cove Irr. Dist. v. Frideaux, quoting Fallbrook and Idaho cases, 196 Pac., 618, 621; 25 Idaho (1913), 112.)

Other comparatively recent cases as to the corporate nature of irrigation districts are to be found as follows: Nampa and Meridian Irrigation District v. Briggs (147 Pac., 75; 27 Idaho, 84); Rathfon v. Payette-Oregon Slope Irrigation District (149 Pac., 1044; 76 Ore. (1915), 606); McCord Mercantile Co. v. McIntyre (138 Pac., 59; 25 Colo. App. (1914), 376); In re Gallatin Irrigation District (140 Pac., 92; 48 Mont. (1914), 605); Brown Bros. v. Columbia Irrigation District (144 Pac., 74; 82 Wash. (1914), 274). In the last-named case the Washington Supreme Court held that irrigation districts are included within a statutory clause affecting "other municipal corporations."

#### FORMATION OF IRRIGATION DISTRICTS.

*Petition.*—The earlier acts follow the original Wright Act of California, and provide that whenever 50 or a majority of the landowners or freeholders owning land in any district desire to provide for the irrigation of the same, they may propose the organization of a district. This provision the courts have interpreted to mean that the petition must be signed by a majority only if the district be such that a majority is less than 50 owners. (See Rothchild Bros. v.



Rollinger et al, 73 Pac., 367; 32 Wash., 307.) The California law has now, however, been so amended as to require signature of the petition by a majority of the landowners representing a majority in value, and several States have made similar changes. In their early history in California these corporations, due partly to the difficulties incident to thrashing out the constitutionality and other legal features in the courts, but partly also owing to the opposition of the large landed proprietors, met with much ill success. Experience indicates that it is safer to have the support of the majority of the owners of the lands to be taxed, even including nonresident proprietors who would be precluded under most statutes from voting at the organization election.<sup>1</sup> There is, however, the possible counter consideration that the initiation of the district organization ought not to be dependent upon nonresident owners who often have only a slight interest in the community and are frequently to be found in the absentee speculator class.

The petition, with preliminary description of boundaries, and a varying amount of information as to the plans proposed, is presented to the county board or to the local court as may be required by the statute. The petition must be accompanied by a bond in double the amount of the probable cost of organization. The bond, however, is not jurisdictional, but is required as a matter of security. (*O'Neill v. Yellowstone Irr. Dist.*, 121 Pas., 238; 44 Mont. (1912), 492.)

*Hearing on organization.*—A hearing is then called, persons interested being notified by the publication, or by both publication and posting of notice with petition attached for a brief period, generally two or three weeks. Upon the hearing, after ascertaining that the petition and notice are regular, the county board, or the local court, as the case may be, proceeds to determine the boundaries and hear petitions of landowners to be included or excluded from the district. In making the determination of boundaries no land must be included which is not benefited and the boundaries must not be so modified as to change the object of the petition or to exempt any land, within the boundaries as contained in the petition, susceptible of irrigation under the projected system. Adjournment of the hearing for further information may be taken, the statute generally placing a maximum upon the period of delay.

Unless the tribunal in question finds some obstacle to further proceeding an election is called which likewise requires no personal service upon individuals and notice is given by publication and posting of notices for a second brief period.

*Organization election.*—At the organization election landowners must vote "Irrigation district yes," or "Irrigation district no," and the statutes vary from a bare majority to a four-fifths majority as to the vote necessary to carry the election. New Mexico is unique in requiring a majority not of the persons voting, but of those entitled to vote.

*Legal character and effect of proceedings.*—This proceeding for organization is a proceeding in rem and notice by personal service is

<sup>1</sup> Mr. Adame's discussion of California experience may be consulted with profit on this subject. See former citation to his work, p. 9.



not required. Publication in accordance with the statute is sufficient.

The publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question and gives them an opportunity to be heard before the board. \* \* \*

There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which requires notice to or hearing of the parties included therein before it can be formed. It is created for a public purpose, and it rests in the discretion of the legislature when to create it, and with what powers to endow it. (*Fallbrook Irr. Dist. v. Bradley*, supra, p. 174.)

While considering the effect of the organization proceedings it should be said that it has long been held that the other proceedings by irrigation districts referred to below are also proceedings in rem, and notice by publication merely is valid. But one recent authority will be quoted:

The organization of an irrigation district and all proceedings in connection therewith, the voting of bonds and other matters, including the decree of confirmation by the district court, are proceedings in rem, and that constructive service of the notice required by said act was sufficient, it is held, to give each and every person interested in the organization of such district his day in court, and to give the court jurisdiction of the person and subject matter and that anyone dissatisfied with the proceedings or judgment of confirmation is given by the terms of said act the right of appeal, and that under the provisions of said act it was not necessary that personal service be made upon the landowners of the district in order to give the court jurisdiction and power to render a judgment of confirmation valid and binding as against them upon all occasions involved in such cases, and that that proceeding does not involve the taking of property without due process of law nor in violation of the obligations of a contract. (*Smith v. Progressive Irr. Dist.*, 156 Pac., 1133, 1135, 1136; 28 Idaho (1916), 812.)

While the courts are not inclined to be captious in construing the statutory steps to be taken, and it is fundamental that the law should be so construed as to effectuate its purpose to facilitate the economic and permanent reclamation of arid lands (*Nampa and Meridian Irr. Dist. v. Petrie*, 153 Pac., 425, 429; 28 Idaho (1915), 227), nevertheless:

This procedure [i. e., hearing upon an organization petition] is purely statutory. The act prescribes in detail the steps necessary to be taken to clothe the district court with authority to act, and these statutory requirements must be fully met before the court can proceed. (*In re Gallatin*, 140 Pac., 92, 94; 48 Mont. (1914), 605.)

The hours during which the polls are open for an irrigation district election is an important matter, the election being invalidated for a defect in some instances in others not. See *Fallbrook Irr. Dist. v. Abila* (39 Pac., 793; 106 Calif., 355), holding the election invalid; and *Baltes v. Farmers' Irr. Dist.*, (83 N. W., 83; 60 Nebr., 310), reaching the opposite conclusion under somewhat different circumstances.

A defective form of ballot may render an election void. (*Edes v. Haley*, 162 Pac., 50; 94 Wash. (1917), 232.)

As regard the lands properly to be included in an irrigation district, there are many decisions in the reports, those cited below being representative.

It was decided early in the history of irrigation district enterprise that the boundaries of districts are within the discretion of the county board in the absence of fraud and "corrupt purpose."

Upon matters affecting their jurisdiction the orders of the board of supervisors may be open to review, but upon the question of fact as to what lands will or will not be benefited by irrigation their decision is final and conclusive. (*Bd. of Modesto Irr. Dist. v. Tregea*, 26 Pac., 237, 242; 88 Calif., 334, writ of error dismissed; 164 U. S., 179; 41 L. Ed., 395.)

In the present case the question was necessarily determined by the board of supervisors of Stanislaus County at the time the district was organized, and, in the absence of any allegation of fraud or bad faith on the part of the board of supervisors, is conclusive. (*Herring v. Modesto I. D.*, 95 Fed., 705, 723.)

The United States Supreme Court has held that an error of judgment by the county board in including land which should not have been within the district is not a proper question for Federal review:

Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decision of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It can not be that upon a question of fact of such a nature this court has the power to review the decision of the State tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision. (*Fallbrook case*, *supra*, p. 167.)

Recent illustrations in States other than California of the same doctrine are: *Smith v. Progressive Irr. Dist.* (156 Pac., 1133; 28 Idaho (1916), 812); *Wilder v. Bd. of Directors of South Side Irr. Dist.* (135 Pac., 462; 55 Colo. (1913), 363); *In re Gallatin Irr. Dist.* (140 Pac., 92; 48 Mont. (1914), 605).

Lands having riparian rights may be included in an irrigation district and taxed. (*Barslow v. Ward County Irr. Dist. No. 1*, 177 S. W. (Tex. Civ. App.), 563.)

Land naturally incapable of irrigation ought not to be included, but comparatively small knolls or sloughs on a tract will not necessarily require that the tract be excluded or exempt it from assessment as a whole. (*Wight v. McGuigan*, 143 N. W., 232; 94 Nebr. (1913), 358.)

An attempt to digest the many points of law construing statutory provisions relating to the organization and the government of irrigation districts would, however, lead far beyond the limits of our present undertaking.

*Inclusion of cities and towns within irrigation districts.*—It is obvious that any municipalities to which the irrigated lands of the project would be directly tributary derive a great deal of financial benefit from the organization of the district and the cultivation of the land following the construction of the works. Town properties are vastly enhanced in value in many instances, and their owners should be called upon to contribute to the cost.

The constitutionality of the California law, as applied to town lots which would never be irrigated on account of structures for non-agricultural purposes erected upon them, was under consideration by the United States Supreme Court in the case of *Fallbrook Irrigation District v. Bradley*, *supra*, and it was there held, following the California decision of *Modesto Irrigation District v. Tregea* (88 Calif., 334), that such lots would be lawfully included in a district if it were properly found that the same were benefited, even though indirectly, by the construction of the irrigation system.<sup>1</sup>

<sup>1</sup> *Fallbrook case* at p. 154,5.

Several States provide for including cities and towns within the project as a part of the district while others do not. The inclusion of large and populous municipalities as portions of irrigation districts is not lightly to be undertaken, however. The farmers have so large an investment and so vital an interest in the operation of the project that they might resent the incorporation of such territory as would result in the greater portion of the electorate being composed of persons who as lot owners merely have individually a comparatively trivial financial and personal interest in the debts and management of the district.<sup>1</sup>

One of the most recent decisions upon the constitutionality of the inclusion of municipalities in irrigation districts is that of *La Mesa Homes Co. v. La Mesa, etc.*, Irr. Dist. (159 Pac., 593; 173 Calif. (1916), 121), wherein, as in other decisions of courts of last resort, the constitutionality of such inclusion is fully upheld.

*Railroad property.*—Upon principles similar to those relating to town property, the lands covered by the rights of way of railroads intersecting irrigation districts are properly to be included in the boundaries of a district and become subject to assessment. It could hardly be said that land occupied by trackage and other realty improvements for railroading is not benefited financially by reason of the increased freight which results from the construction of irrigation works in its vicinity, and such lands are doubtless subject to inclusion and taxation.

*Federal and State lands.*—For the Federal and State lands page 23 and page 60, respectively, should be consulted.

*Concurrence by State engineer in formation of district.*—Several of the States now require that the petition, together with all plans and maps for the irrigation system, be submitted to the State engineer for his examination and report to the county board. The Idaho law goes so far as to provide that if the State engineer's report shall be adverse, the county board must refuse the petition unless requested in writing by three-fourths of the landowners in the proposed district. Most of the statutes, however, stop short of such a requirement, and the county board or the local court, as the case may be, in several States receives the report as a matter of advice, action being as fully discretionary with the board as though the report had not been made. In some cases it is incumbent on the board to give publicity to the report of the State engineer.

One of the dangers which irrigation districts share with other forms of organization for irrigation purposes is that the local interests, either in a mistaken spirit of loyalty to the home community or induced by desire for profit, may promote some project which has not all the necessary foundations of soil, water supply, market facilities, and the like. Hence the provisions requiring a report by the State engineer as an official in most cases free from local bias and self-interest are of great importance. In some cases they would prevent or postpone the adoption of questionable projects, and in other cases they would lend confidence and credit to meritorious projects. The advisability of such State supervision is not peculiarly to be directed to irrigation districts, for the same comment

<sup>1</sup> The question of electorate is discussed below, at p. 18.

is at least equally applicable to projects organized in forms other than that of a public corporation.

These provisions, therefore, should be considered carefully by all States which have not as yet passed them, and several of the statutes can be strengthened to the end that where the State engineer is doubtful as to the feasibility of the project, full publicity be given to his views, and that the plans be required to be amended or the district voters assent after full consideration.

*Conclusiveness of organization.*—Irrespective of the decree resulting from confirmation proceedings,<sup>1</sup> it is not easy to nullify the organization of an irrigation district once it is established as a corporation in fact under a constitutional statute and is exercising its corporate functions. There may be defects in the legal proceedings whereby the organization was intended to be perfected. Courts have held in numerous cases that such de facto district can not be attacked collaterally, as for example in foreclosure proceedings for the collection of district assessments. A Federal circuit court of appeals has said:

The question of the legality of the organization of the irrigation district may not be raised collaterally if the district be acting under color of law and the State acquiesces therein. (*People v. Linda Vista Irr. Dist.*, 128 Calif., 484; 61 Pac., 86; *Miller v. Perris Irr. Dist.*, 85 Fed., 693; *Quinton v. Equitable Inv. Co.*, 196 Fed. (1912), 314, 317.)

In fact, it has been held that the validity of irrigation districts, in common with other similar public corporations, is subject to direct attack only by the State, either at the instance of the attorney general or upon the relation of private persons alleging themselves aggrieved. (See *Miller v. Perris Irr. Dist.*, 85 Fed., 693; 92 Fed., 263, and *Holland v. Avondale Irr. Dist.*, 166 Pac., 259; 30 Idaho (1917), 479.)

Moreover, the principles of estoppel may often be of avail in preventing a successful denial of the valid organization of an irrigation district. For example, the district itself obviously can not plead the invalidity of its organization as a defense to the district debts, and the district officers and all landowners who signed the petition for formation or voted for organization are estopped to plead the defective status of the district.

In a case before the United States Supreme Court the doctrine of estoppel was applied where an irrigation district had received consideration for a bond issue sold and had built the irrigation works; but—

Notwithstanding these facts, it [the district] now refuses to pay the bonds or the interest thereon and, while acting as a corporation at all times, still sets up that it was never legally organized, and hence had no legal right to issue any bonds.

In the case of *Douglas County Commissioners v. Bolles* (94 U. S., 104, 110), a case involving facts somewhat similar, this court said: "Common honesty demands that a debt thus incurred should be paid." That sentiment has lost no force by the lapse of time, and we think it applies in its full strength to this case. (*Tulare Irrigation District v. Shepard*, 185 U. S., 1, S.)

Some States, as severally noted below, in addition to provision for judicial confirmation, place a statutory limit upon the period during

<sup>1</sup> See our discussion of confirmation proceedings below, p. 47.

which any defect in the proceedings for organization may be litigated. After quoting from the confirmation act and the statute of limitations as contained in the California irrigation district act, a Federal court said:

These two statutes, taken together, furnished the irrigation district with a plain and speedy method of procedure for determining the legality of the proceedings under which it was brought into existence, and gave to the public dealing with such a corporation the protection of a just and reasonable statute of limitation against the defense that its formation was irregular and its birth illegitimate. (*Herring v. Modesto Irr. Dist.*, 95 Fed. 705, 721.)

Unless the period named in the statute is so brief as to fail to give reasonably diligent persons opportunity to take action in the courts, and thus result in the violation of the constitutional provision requiring due process of law, the courts hold the limitation valid and conclude the right of action. The presumption strongly favors the validity of the statute. (17 Rul. Cas. Law, 678; *Hayes v. Douglas County*, 65 N. W., 482; 92 Wis. 429.)

The principles of de facto corporations, estoppel, and statutory limitation, applied to irrigation districts in the foregoing paragraphs are in no respect different from those long declared applicable to other varieties of public corporations.

The most important means of securing repose as to the legality of the irrigation district organization proceedings is by the direct judicial confirmation. This is primarily a proceeding in settlement of the validity of a bond issue, and hence is discussed below, page 47, but inasmuch as the decree in confirmation settles the validity of the organization just as conclusively as that of the bond issue, the reader should bear it in mind equally in the present connection.

#### ELECTIONS AND QUALIFICATIONS FOR VOTING.

The statutes provide for the conduct of elections, generally making applicable the provisions of the general election laws of the State excepting so far as modified by the provisions of the irrigation district acts. As a rule prior registration and any particular form of ballot are expressly dispensed with. Provision is made for the appointment of election officers and notice of all elections is required to be given and the polling hours are fixed by the statutes. After the organization election the county board is required to publicly canvass the votes. Subsequently canvass is made by the district board. Election precincts are provided for by the board in such number as will facilitate the voting. At general and special elections a majority of the votes cast suffice to carry the measure proposed, whereas in the formation of the district and the incurring of indebtedness larger majorities are frequently required by statute. This will be found recited under the head of particular statutes.

Provision is likewise made in several States for the care of ballots, for their retention for a certain period, and for their ultimate destruction. The board of directors enters in the records of the district a statement in detail as to the results and delivers certificates of election to the persons chosen.

*Qualifications of voters.*—The statutes differ radically as to the qualifications for voting, and the requirements which govern in each of the various States will appear later. In some States no property

qualification is required, residence in the district alone being sufficient. By far the greater number, however, require ownership of land, either in general terms or to a given acreage, as in Nebraska; or the voter may merely have a leasehold in State land or an entry of Federal land as a necessary qualification. Different requirements are sometimes imposed in the case of an election for the incurring of a bonded debt than for an election for general purposes. Several States confine the right to vote to the owners of "agricultural land."

In most of the jurisdiction all those who are entitled to vote have the same voting power, but in Utah votes at all elections are cast in proportion to the number of acre-feet of water which each landowner is entitled to use, provision being made for signed ballots; and in Nevada each landowner at elections to incur a bonded indebtedness or to authorize a contract with the United States has one vote for each dollar of benefit assessment apportioned to his land, with a provision for prior registration.

It is not deemed probable that the qualifications prescribed for voters under the district laws in either Nevada or Utah will meet with favor or prove satisfactory or workable. In one case the voting power is measured by dollars while in the other it is measured by the quantity of water used. The first encourages large and speculative holdings and the second places a premium on the excessive use of water. Each plan overlooks the fact that, as a rule, one with a small farm may have the home idea as well instilled in his nature and be as interested in the permanent success of the project, as one who owns a farm 16 times as large (thereby paying taxes proportionately) and has 16 votes to his 1.

Under the Nevada law one whose home farm consists of 4 acres would have but 4 votes, as against 40 votes for the 160-acre land owner. Under the Utah law the farmer who knows best how to conserve and prevent the waste of water, and who may, with 2 acre-feet of water, produce crops on a par with another using 6 acre-feet on the same kind of soil, will have but one-third as much voting strength with the same acreage.

The argument in support of either plan is on a par with the argument that the average voter be allowed votes in proportion to his age, wealth, experience, education, or station in life. It was once urged that a bachelor should pay no school district tax because he had no children in school, and that families with children should pay taxes and be given votes in proportion to the number of children of school age in the family. This would encourage celibacy among the unmarried and small families among the married. Such a plan of participation in the affairs of a school district would be no more pernicious than are the Nevada and Utah qualifications for voters in irrigation districts, and it is quite likely the laws of both of those States will be amended upon this point in the near future.

The provisions of the Idaho irrigation district act of March 6, 1911, placing property qualification upon voters in an irrigation district, requiring that ballots be marked, and declaring residence within the State as sufficient have been declared invalid. It was held that the law in these respects was contrary to the constitutional provisions prohibiting property qualifications, protecting the secrecy of the ballot, and requiring a period of six months' residence in the county as prerequisite to voting. The opinion of the supreme court



was based upon the public character of the corporation. (*Pioneer Irr. Dist. v. Walker*, 119 Pac., 304; 20 Idaho, 605.)

Other States have not agreed with Idaho as to the applicability of similar constitutional provisions to elections held by irrigation districts. The Supreme Court of Oregon, after citing the Idaho decision, upheld the irrigation district law which permitted nonresidents to vote, and imposed a property qualification as a condition to voting. The court reached the following conclusion:

We believe we are not running counter to section 2, article 2, of the constitution in this conclusion, and a contrary holding would work a great wrong upon the farmers, who may obtain considerable benefit under such an organization, and who, on the other hand, might be burdened by debt beyond the benefits conferred; and its affairs should be left exclusively to those affected thereby. (*Board of Directors of Payette-Oregon Slope Irrigation District v. Peterson*, 128 Pac., 837, 840; 64 Oreg., 46.)

A similar conclusion has been reached as to the constitutionality of the election provisions of the California irrigation district law, construing, however, constitutional terms quite different from those in Idaho. (*In re Bonds of Madera Irrigation District*, 28 Pac., 272; 92 Calif., 296; rehearing denied, 28 Pac., 675; 92 Calif., 296.)

It is probable that Idaho stands alone among the irrigation district States in not taking note of the fundamental distinction between public corporations for the ordinary Government purposes and public corporations formed for improvement purposes, as regards the applicability of constitutional provisions such as those above referred to. This distinction is noted generally throughout the country also as regards cities and towns when performing the functions of improvement districts as contracted with the ordinary work of the Government. Property qualifications in the former class of cases have been held not violative of constitutional provisions relating to elections. The California Supreme Court has reached this conclusion as regards election provisions in laws for the kindred purpose of reclamation by drainage. (*People v. Reclamation District*, 117 Calif., 14; 48 Pac., 1016; *People v. Sacramento Drainage District*, 103 Pac., 207; 155 Calif, 373. See also *infra* p. 67.)

#### DISTRICT OFFICERS.

*The board of directors and its functions.*—The powers of the irrigation district are exercised through a board of directors. The standard number of members is three, but under recent acts some times varies in accordance with the size of the district or is made a question determinable at a special election. In several States the members of the board are elected at large and in others by the voters of respective subdivisions of the district.

All property of the district is taken in the name of the district by the board and is dedicated to the purposes of the law. The board has power to acquire property by the exercise of the right of eminent domain or otherwise and must administer all district property. The district may sue and be sued, the conduct of cases being in the hands of the board of directors who hire an attorney for the purpose, since no public official occupies the position of counsel for the board. The board is authorized to secure and remove agents and employees.



The board may enter upon any land to make surveys and may locate the necessary irrigation works. The construction of works is in charge of the board which is in some States expressly required to secure the services of a competent engineer. Provision is made for the awarding of contracts to the lowest responsible bidder after proper advertisement therefor, and the States differ as to whether the board may refrain from letting contracts for the construction of irrigation works and pursue the course of doing the construction work with its own forces.

Means of supervision by the State through the State engineer over construction work are now receiving favor with the legislatures. Such a requirement protects the landowners and the creditors of the district and is a valuable addition to the law. In the early days of irrigation development, not only by districts but by private corporations there was a tendency to engage upon large enterprises with engineering, legal and executive ability of two inexperienced a grade to accomplish the best results. This tendency has been overcome to a large extent in recent years but the supervision of State agencies gives an additional guarantee of safety provided that State officials are chosen who will not unduly hamper the officers of the district by the imposition of restrictive regulations. Such a provision of law has been held valid in the case of *Riverside Reservoir & Land Co. v. Green City Irr. Dist.* (151 Pac., 443; 59 Colo. (1915), 514).

Meetings of the board are generally required to be public. Notice of the time and place of meetings is generally necessary, and provision is made also as to the quorum.

As will be more fully described below the perpetual operation and maintenance of the system devolves upon the board of directors. The board also has important functions in the levy of the assessments also referred to hereafter.

*Other district officers.*—The laws differ as to several of the district officers, some providing that the district shall have its own treasurer and assessor and collector of taxes, others providing that the treasurer and assessor of the county where the lands or the major portion thereof lie shall act as ex-officio officers of the district. If those offices are not consolidated with similar county offices their incumbents are chosen by the electors of the district. The board has appointive powers as to the attorney, engineer, secretary, and other officers of the district.

#### COOPERATION WITH THE UNITED STATES.

*Provisions in State laws.*—Among the powers conferred upon the board of directors is that of cooperation with the United States. The board is authorized, in lieu of constructing the works by contract with private construction corporations or the district's forces, to contract with the Federal Government so that the United States shall construct the works under the Federal reclamation law, lending the money to the district either with or without the issuance of bonds for such purpose.

Laws to this end have been enacted in all of the 17 States referred to in this compilation except Wyoming and Kansas. The powers of the board with respect to making the contract referred to

extend to the negotiation of the terms of agreement, but except in North and South Dakota the contract must be authorized by a vote of the electors of the district after proper notice stating the total amount of money, exclusive of operation and maintenance charges, penalties and interest, proposed to be payable to the United States under the contract. In the two States last named, although no express provision for an election upon a contract is required, it is preferable that an election be had in the same manner as in case of an election upon a proposed bond issue. The district board is authorized not only to contract for the construction of the works by the United States, generally including expressly both water supply and drainage systems, but also for the acquisition, purchase, extension, and operation and maintenance of existing works, or for the assumption as principal or guarantor of indebtedness to the United States on account of district lands. It is under the latter described clause that the majority of the irrigation districts formed upon Federal projects named above have made contracts. The districts assume a liability to the United States for the project debt in place of the former water users' associations.

The new Federal project in Idaho, the King Hill, is organized as an irrigation district and has made agreement with the United States without being preceded by contracts with individual landowners as is the case upon the earlier projects.

There are over 20 irrigation districts, in addition to those named above, chiefly adjacent to, and, in a broad sense, a part of, the Boise project, Idaho; North Platte project, Wyoming-Nebraska; and Yakima project, Washington, which have made contracts with the United States for the payment of moneys in consideration for a water supply purchased by the districts under the so-called Warren Act of February 21, 1911, entitled "An act to authorize the Government to contract for impounding, storing, and carriage of water and to cooperate in the construction and use of reservoirs and canals under reclamation projects, and for other purposes" (36 Stat., 925). This law expressly authorizes the Secretary of the Interior to contract with irrigation districts.

When contract is executed with the United States pursuant to State statute, provision may be made that the delivery and distribution of water for district lands shall accord with the acts of Congress and the rules and regulations of the Secretary of the Interior thereunder. Moreover, the requirements of law regulating the making and levy of assessment for district purposes are rendered more elastic to follow such different procedure as may be required in order to comport with the Federal laws and the provisions of contracts previously entered into in order to carry out the Federal laws, so that the districts may collect the moneys to become due from respective tracts throughout the district. To this end, in States where assessments are required to be made according to acreage or according to benefit, as the case may be, the district, where contract is made with the United States, may make and levy assessments in accordance with the installment basis prescribed by the Federal laws.

Other important provisions are inserted to facilitate cooperation with the United States. For example, the board is authorized to convey to the United States any rights of way or other property acquired by the district in so far as the same may be needed for

construction, operation, or maintenance of works by the United States for the benefit of the district.

The Supreme Court of Idaho has several times passed upon the power of the State and the United States to contract for the purpose of cooperation under the reclamation and Warren acts, and has reached the conclusion that such contracts are validated both by the State and Federal laws:

That the Secretary of the Interior has the power to enter into a contract to supply water to an irrigation district under the provisions of the act of Congress of June 17, 1902, known as the reclamation act (32 Stat. L., 388; 7 Fed. Stats. Ann., 1098; U. S. Comp. St. 1913, secs. 4700-4708), we think there can be no doubt. If there was any doubt of the authority of that official to enter into such contracts, it was clearly removed by the act of Congress of February 21, 1911, known as the Warren Act (36 Stat. L., 925, sec. 2; U. S. Comp. St. 1913, sec. 4739), and the subsequent enactment of Congress passed August 13, 1914, known as the reclamation extension act (ch. 247, sec. 7, 38 Stat., 688). (*Nampa & Meridian Irr. Dist. v. Petrie*, 153 Pac., 425, 428; 28 Idaho, 227.)

This case was appealed to the Supreme Court of the United States and was there dismissed on the ground of lack of jurisdiction. The same court also upheld contracts between irrigation districts and the United States in the cases of *Pioneer Irrigation District v. Stone* (130 Pac., 382; 23 Idaho, 344), and *Hillcrest Irrigation District v. Brose* (133 Pac., 663; 24 Idaho, 376).

*Federal lands in irrigation districts.*—Where districts have not availed themselves of an act introduced by Representative Addison T. Smith, of Idaho, approved August 11, 1916 (39 Stat., 506), and there are unpatented public lands within their boundaries, they are much hampered in their operations. The following by the Supreme Court of Idaho as to irrigation districts in that State might be truthfully said of several of the Western States:

In many cases title to arid lands can not be acquired from the General Government without water for irrigation purposes, and in none of the irrigation districts organized in this State were the lands included therein all patented at the time the district was organized. (*Indian Cove Irr. Dist. v. Prideaux*, 136 Pac., 618, 620; 25 Idaho (1913), 112.)

Several of the legislatures years ago made provision that entrymen upon public lands of the United States may sign as petitioners for the formation of irrigation districts and after the district is formed may vote. The courts of last resort in irrigation States have not been in accord with reference to the status of public lands of the United States in districts.

In Idaho the view was taken that irrigation bonds issued against entered public lands of the United States "would be valid and binding to the extent at least of the title, interest, or claim of such entryman in and to such lands whether acquired by him from the State or the General Government." The question "as to what liability the bonds would impose upon such lands beyond and in excess of the interest acquired or held by the entryman" was declared not to concern the court in the case at bar. (*Gem. Irr. Dist. v. Johnson*, 109 Pac., 845; 18 Idaho, 386.) The same court in the Indian Cove irrigation district case (citation above) held that "whatever property rights or interest respondent (an entryman who had not yet obtained his patent) may have in the lands in question (his desert entry) are subject to the laws of the State not in conflict with the Federal laws on the same question."

The Montana Supreme Court has declared "that a settler upon Government lands does not have a taxable interest in the land prior to making final proof has been the universal holding, or practically so, of all the authorities." (In re Gallatin Irrigation District, 140 Pac., 92, 94; 48 Mont. (1914), 605.)

The Supreme Court of California early held that entered public lands of the United States prior to the issuance of patent were not susceptible of assessment by an irrigation district, but that the inclusion of such public lands in a district would not necessarily invalidate the organization. (In re Madero Irrigation District Bonds, 28 Pac., 272; 92 Calif., 296.) The same court went so far as to hold that lands so included within a district would not be assessable even after patent had issued in the absence of the consent of the United States or the purchaser.

The following is quoted from the case of the Nevada National Bank v. Poso Irr. Dist. (72 Pac., 1056; 140 Calif., 344):

It is clear, therefore, that so long as the said land now owned by the intervenor remained public land of the United States no liability created by the State or district attached thereto.

The further question then arises: Did the sale and conveyance by the United States to the intervenor or her grantor operate to charge it with a pre-existing liability not created or assented to either by the Government or its grantee? This question must also be answered in the negative, for, if the grantee of the United States must take the land burdened with the liability of an irrigation district made to include it without the assent of the Government or the purchaser, it attaches a condition to the disposal of the property of the Government without its sanction or consent, and which must, in such cases, interfere with its disposal. (Id., pp. 1057, 1058.)

This rule necessitates the prosecuting of statutory proceedings for the annexation of the lands to the district upon petition of the owner. The contrary view of the assessability of lands after patent has issued, which had previously been included in a district, was taken by the Court of Appeals of Colorado in the case of Carson v. Cudworth, and it was held that the patent related back to the issuance of the receiver's receipt. (140 Pac., 935; 25 Colo. App. (1914), 131.)

*Congressional act in favor of districts.*—It is evident, therefore, that in order to assure the proper assessment for irrigation purposes of land in which the Federal Government retains an interest, the districts should promptly avail themselves of the Smith Act. The purposes of this law will be found well stated in the "Regulations concerning State irrigation districts in their relations to the public lands of the United States," approved by Secretary Lane on March 6, 1918, and issued by Commissioner Clay Tallman, of the General Land Office, in part as follows:

Briefly stated, the purpose and effect of this statute is to empower the Secretary of the Interior, following the presentation of a proper application therefor, to investigate the plans and financial and physical resources of irrigation districts heretofore or hereafter organized pursuant to the law of any State, and, if he shall find and conclude that any such district has planned and is executing an altogether meritorious and feasible irrigation undertaking, to grant his approval of its plan and undertaking, provided a majority acreage thereof is not unentered land, to the end that upon such approval, and upon compliance by such districts with certain conditions in said act specifically set forth, all unentered public land and land which has been entered, but upon which final certificate has not issued, shall be amenable to the State laws governing the district to the same extent and upon like terms as are privately owned lands within said districts.

Tax liens upon unentered and unpatented lands are expressly provided for, and no entry of lands can be made until all charges and liens under the district laws are paid.

Provision is also made for tax sale of entered lands and tax liens against unentered lands.

These regulations conveniently set forth the bill, and may be had upon application. They are also published in volume 46 of the Decisions of the Department of the Interior Relating to Public Lands, page 307.

*Additional congressional action desirable.*—The Smith Act<sup>1</sup> should be broadened to provide similar relief for drainage districts, and might also be amended so that districts of both types in which the major part of the land is unentered public lands of the United States might still avail themselves of the law in cases where the district contracts with the United States under the Federal reclamation laws. The reasons underlying the prohibition against the recognition of districts having a major portion of unentered public lands are not applicable when a Federal project is undertaken.

*Statutory bar to farm loans should be removed.*—Another important piece of legislation should be enacted by Congress for the purpose of cooperation with irrigation districts. Under the terms of an act entitled "An act providing for patents on reclamation entries, and for other purposes," approved August 9, 1912 (37 Stat., 265), lands patented within reclamation projects are required to be burdened by the reservation of a lien in the patent for the payment of reclamation charges. Where irrigation districts are formed upon Federal projects and contract with the United States, the reserved lien upon patented public lands is not necessary for the safeguarding of the Federal reclamation fund, the Government having the same ample security as for the repayment of charges against other private lands of the project within the irrigation district. The methods of assessment and levy for payment to the Federal Government by irrigation districts are described below.

The reservation of the lien in the patent is tantamount to a mortgage in favor of the United States, and has been very properly held by the Federal Farm Loan Board to preclude the approval of loans upon lands burdened thereby, since the Federal farm loan act (39 Stat., 360) prescribes that first mortgage security must be obtained for all loans approved thereunder. (But the irrigation district is an assistance to securing Federal loans where land patents antedate the act of 1912. See *infra*, p. 64.)

A measure to relieve lands from the reservation of lien, so embodied in the patent, where a contract is made between the United States and an irrigation district for the payment of all charges to become due from the lands in question, was introduced as House resolution 4954 by Representative John E. Raker, of California, in the first session of the Sixty-fifth Congress, and was defeated in the House on January 23, 1918. The irrigation district and the type of security obtained by contract with these corporations presented novelties to members from nonirrigation States, and in view of the limits upon the consideration which could be devoted to the matter during debate and the lack of full understanding, the action taken was entirely comprehensible.

<sup>1</sup> So named for Representative Addison T. Smith the author (act of Aug. 11, 1916).

This measure, or similar legislation should be enacted to the end that without impairing the security of the United States, the loaning of money at low rates of interest may be legalized in favor of entrymen upon public lands of reclamation projects, and entrymen who have obtained patent encumbered under the act of 1912, as well as for those upon the private lands of the same projects and other rural lands of the United States.

Additional information relative to the objects sought to be secured by the Raker bill will be found in the hearings on H. R. 262 before the Committee on Irrigation of Arid Lands, House of Representatives, Sixty-fourth Congress, dated February 26, 1916, and in the favorable report of the same committee upon the bill, which as reintroduced was H. R. 4954, being House Report No. 93, Sixty-fifth Congress, first session. These publications contain statements by Mr. B. E. Stoutemyer, district counsel of the Federal Reclamation Service; Mr. J. M. Thompson, of the Idaho bar; and by the writers of the present discussion.<sup>1</sup>

#### DRAINAGE BY IRRIGATION DISTRICTS.

*Drainage an irrigation necessity.*—It is little understood in the humid parts of the country that in regions naturally desert the rise of seepage waters consequent upon irrigation is a serious menace. In very many cases not even economical irrigation, and the use of what is known as a "high duty of water" will prove efficacious, although they will delay and lessen the problem. Only projects having favorable conditions of soil and topography altogether escape the evils of seepage and alkali.

An irrigation project, therefore, after having gone through its primary construction stage, is quite likely to encounter other needs, and often must assume new burdens before the indebtedness for the construction of the original works has been discharged. The time or extent of such drainage necessities is an engineering problem impossible to determine in advance.

*Supply and drainage systems equally irrigation works.*—Without the drainage works in cases where seepage and alkali rise the irrigation project fails, and the outcome may be far worse than if the land had remained arid. The drainage works are therefore as essential to the continued irrigation of these projects as is the supply system, and the supply and drainage systems constitute interdependent parts of the project works, the drainage system properly falling within the term "irrigation works."

The necessity unity of the supply and drainage system has been recognized by the Supreme Court of Idaho:

The dominant purpose of our irrigation district law is to facilitate the economical and permanent reclamation of our arid lands, and it must be the constant aim of judicial construction to effectuate that purpose so far as consistent with the whole body of our law. The continued existence of an irrigation district depends upon its ability to furnish water to land owners within the district. The stability and efficiency of the district as a quasi municipal corporation also depends upon the power to construct proper drainage within its limits. In the absence of either the right to furnish an adequate water supply or to construct an effective drainage system, the very purpose

<sup>1</sup> See also: Discussion by chief counsel, U. S. Reclamation Service, copied in Report Arid Lands Committee of the House (Part 2), Sept. 18-19, 1919, and reported in December, 1919, issue of Reclamation Record.



and object of the district would be thwarted, and the growth and development of the State retarded to its serious detriment. (Nampa and Meridian Irr. Dist. v. Petrie, 153 Pac., 425, 429; 28 Idaho (1915), 227.)

*Experiences of the Federal service in drainage.*—When the reclamation act was passed, considerable doubt was entertained whether the congressional authority to construct irrigation works went to the extent of the building of drainage systems. The logic of the situation compelled the adoption of the theory that drainage works are a necessity and are as truly irrigation works as storage reservoirs or carriage canals. Drainage works upon certain projects were built as early as 1905 and simultaneously with the supply systems. Upon other projects, however, construction of a drainage system was not deemed advisable, either in the hope that seepage waters would not rise or in the belief that the financial burden of the construction of the original works could be met first and the drainage system built later when a second financial burden could be more readily carried.

The time for repayment to the United States was, however, increased to a period of 20 years following the passage of the reclamation extension act of August 13, 1914 (38 Stat., 686), and the investment of the Government upon the projects has proved of greater duration, and drainage now occupies a conspicuous place in the affairs of various projects. Drainage has occasioned a large increase of cost to several projects; and some of those to which we have previously referred, including the Elephant Butte irrigation district and the El Paso County water improvement district No. 1 on the New Mexico and Texas portions of the Rio Grande project, and the Newlands irrigation district in Nevada, have organized as irrigation districts, largely with the motive of facilitating cooperation with the United States in drainage construction.

*Recognition by Congress.*—The view that the reclamation act sanctioned expenditures for drainage as part of the irrigation works expressly authorized by that act has been fully sustained by Congress in the annual appropriations which have been made for the construction of drainage works. For example, in an appropriation made for the Rio Grande project, the necessity for such works was recognized and the creation of an irrigation district was required as a prerequisite to expenditure therefor.

To quote from the sundry civil act the clause appropriating for the Rio Grande project in New Mexico and Texas:

For maintenance, operation, continuation of construction, and incidental operations, \$648,000, together with the unexpended balance of the sum appropriated for this project for the fiscal year nineteen hundred and seventeen: *Provided*, That no part of this appropriation shall be expended for drainage except in irrigation districts formed under State laws and upon the execution of agreements for the repayments to the United States of all project investments. (Act approved June 12, 1917, 40 Stat., 148.)

*Drainage district statutes.*—Drainage necessities, coming later than the construction of the supply systems, have received far less development in the irrigation laws of the Western States. In fact, for many years legislatures were much inclined to regard drainage problems as in a sense distinct from those of irrigation. Drainage district laws similar to those of the Mississippi Valley and the Eastern States have been enacted in the West. These in the main provide machinery different from that under irrigation district laws as to



making of assessments, and are distinct in other respects. These laws have been employed both for the reclamation of lands the marshy or overflowed condition of which is natural and for reclamation from seepage caused by the artificial application of water. It should not be necessary, however, to employ the drainage district in the latter class of cases, and in the former class only when the lands reclaimed are not later to require irrigation.

*Irrigation district should be used for drainage.*—The irrigation district is preferable as a means for providing and maintaining drainage upon irrigation projects, being an organization designed not only to forestall or remedy unfortunate conditions, but also to build and perpetually to manage the water supply system which must constitute the vital and permanent adjunct to agriculture, provided, of course, that the controlling irrigation district act is sufficiently elastic.

The usual type of drainage district where formed upon an irrigation project constitutes a second organization operating and maintaining its system of drainage structures and keeping up an organization which parallels and partially duplicates the labors of the organization delivering water to the same land for irrigation.

In California where there are great areas in the Sacramento and San Joaquin Valleys requiring drainage, as well as the most important irrigation interests of any Western State, the essential unity of drainage and irrigation work is recognized and, in the act styled the "California irrigation act," approved June 4, 1915 (Laws of 1915 ch. 621, p. 1173), as amended in 1917 (Laws of 1917, ch. 646, p. 1068), provision is made in comprehensive fashion for the "reclamation of swamp or overflowed land," and for the charging of the benefits for the drainage (see sec. 7) and for the irrigation of the land when drained. The act also authorizes the creation of conservation and irrigation districts, and for "the conversion of irrigation districts, reclamation districts, drainage districts, and other political subdivisions of the State, organized for the purpose of promoting irrigation, reclamation and drainage, into irrigation districts under this act \* \* \*."

The supervision of the districts formed for these various purposes or for a combination of such purposes was placed in charge of the California Irrigation Board, created by the same act. A discussion of the California act is not feasible within the limits of the present undertaking, but legislators may well give careful attention to what California has attempted in the acts of 1915 and 1917 when it is desired to combine drainage and irrigation enterprises under one law.

From the discussion to follow of the provisions relating to drainage in the various States, it may be noted that several make provision in general terms for drainage by irrigation districts of the ordinary type. Others provide that drainage works may be covered by contract with the United States upon such projects as are undertaken or assisted by the Federal Government, but are silent as to drainage by districts not cooperating with the United States. The irrigation district laws of several other States, however, make no reference whatever to drainage.

*Doctrine of Idaho courts.*—Among the last is Idaho. Although the legislature has made no reference to this important part of the work in the irrigation district statutes, the Idaho supreme court holds that necessary drainage works upon an irrigation project are

to be deemed "irrigation works" equally with the construction of reservoirs and carrying canals.

The first case in Idaho bearing upon this subject is that of *Bissett v. Pioneer Irrigation Dist.* (120 Pac., 461; 21 Idaho, 98), decided in 1912:

If, in the course of performing this work [i. e., procuring a water supply] seepage and percolating waters from the canal system flood and overflow the lowlands of landowners within the district, the district is certainly under an obligation to take care of such seepage or overflow and protect such lands (*Stuart v. Noble Ditch Co.*, 9 Idaho, 765; 76 Pac., 255); and it would seem that the district would have the implied power to take such steps as would be necessary, in order to protect landowners from damage or the loss of the use of their lands. (*Id.*, p. 464.)

The views thus outlined were in the nature of dicta, and were later adopted by the court as will be noted from the following:

Upon the question of whether or not an irrigation district has a right to provide means and expend money for the drainage of overflowed lands within the district, this court, in the case of *Bissett v. Pioneer Irrigation District* (21 Idaho, 98; 120 Pac., 461), expressed the opinion that such action might be taken. While the views there expressed were not essential to the determination of that case, a further investigation of the question convinces us of the correctness of the impressions the court then had on the subject, and we adopt the views therein expressed as the opinion of the court and hold that an irrigation district possesses the powers necessary to drain its overflowed lands and to protect its landowners from seepage and overflow waters as well as to supply water to the dry and arid lands of the district. (*Pioneer Irrigation District v. Stone*, 130 Pac., 382, 383; 23 Idaho, 344, 1913.)

The same doctrine has been put into further practice in the cases of *Colburn v. Wilson* (132 Pac., 579; 24 Idaho (1913) 104), wherein it was declared that the district lands must be considered as a whole and that all lands must be assessed for benefits for the improvement and maintenance of drainage work, and *Nampa and Meridian Irr. Dist. v. Petrie* (153 Pac., 425, 429; 28 Idaho, 227). The view which the Idaho courts and the Federal Reclamation Service have adopted, namely, that statutory authority to construct irrigation works covers equally drainage works necessary to an irrigation project may well be followed in the interpretation of irrigation district laws throughout the west. This doctrine is more obviously, but probably not more truly, applicable where the supply and drainage works are constructed simultaneously as component means to irrigation than where the drainage works are undertaken long after the supply system.

The excavation of supply ditches generally precedes the development of farms to be served, whereas similar construction work for drainage ditches as a rule follows the cultivation of the soil. Hence the award of damages is a much more important matter in the latter case than in the former, the losses being very unequally distributed among the landowners. This circumstance should receive more careful consideration than it has been given in the States where merely general authority to provide drainage is conferred upon irrigation districts.

In New Mexico, where the ordinary assessments are fixed by the irrigation district statute on a per-acre basis, a special provision was made in 1917 for the award of damages and the assessment of benefits for drainage.

<sup>1</sup> See discussion at p. 54 below as to basis for assessments.

*May high lands be assessed for drainage of low lands?*—Another question vital in drainage affairs on irrigation projects, however they may be organized, is the assessment of high lands. The drainage laws of arid and semiarid States are often based upon the situation applicable in humid regions where the need for drainage is almost solely due to natural conditions of elevation, soil, and topography.

The upper lands, doubtless, contribute to the swamp and overflowed condition of the lower lands through the processes of nature, and so long as the owner does not, by changing natural conditions as regards surface and percolating waters, violate the rule of morals and of law that a man must so use his own as not to injure that of another, neither moral nor legal responsibility will be entailed by the upper owner in favor of the lower.

The cost of drainage in humid regions, therefore, may be assessed with entire propriety and justice in proportion to the enhancement of the market value of the tracts to be drained as such value is ordinarily defined.

In irrigated countries, however, the most important drainage problems are the result of irrigation, the ground water and alkali rising on the lower lands largely as the result of the irrigation practiced on farms in the vicinity having higher elevation.

This artificial situation fundamentally modifies the equities and renders the principle of benefit based on enhancement of a strict present market value unsound in all cases of drainage incidental to irrigation. The situation calls for some rule of assessment which will recognize the physical unity of the drainage area, and the partial responsibility of the owners of higher lands for the drainage difficulties, to wit, a broader rule of benefit.

Furthermore, proper assessment is sometimes a necessary condition to the continued cultivation of considerable areas, for if the lower lands are to be assessed for the entire cost of drainage, those which are water logged sometimes become chargeable with more than the lands will stand as a practical farming proposition, and thus valuable property may be lost, and the protection of lands not so greatly damaged and the security of the creditors of the district may be jeopardized.

It is, therefore, exceedingly important that legislatures and courts develop a body of law whereby the cost of drainage shall be assessed equitably and in practical fashion.

*Idaho charging high lands.*—The State of Idaho appears to have solved the problem for that State. The drainage district law passed in 1913 (Idaho L. 1913, ch. 16, p. 58) was amended at the next session (L. 1915, ch. 42, p. 123) by the addition of the following section:

SEC. 9a. In determining the amount which each tract of land will be benefited by such proposed drainage system the commissioners shall consider the damage done to low land from seepage and saturation by irrigation water from high land, and the necessity for the carrying off of waste water, and such high lands shall be considered as being benefited to the extent and in the amount that such lands are responsible for damage to low lands from seepage and saturation by irrigation water.

The supreme court of the State has strongly upheld the statutory provision above quoted in the cases mentioned below. The require-

ment that lands responsible for the damage shall be deemed benefited is declared valid, upon the ground that the former common-law rule recognized the responsibility of upper owners, and that it is competent for legislatures to revive the earlier doctrine.

The doctrines of these cases are of so great importance to many sections that we venture to make unusually full quotations, the italics used being ours:

The English common law as well as the early American rule was to the effect that any person who conveyed or accumulated water upon his land by *artificial* means did so at his peril, and if any water should escape by means of seepage, and damage result, liability therefor was conclusively presumed. During the years of the development of irrigation in the western country, the courts, with the desire, evidently, of lending every encouragement to the reclamation of arid lands, required proof of negligence in the construction of canals before permitting the recovery of damages from seepage. \* \* \*

It seems in this irrigated country the question of drainage is now confronting almost every irrigated section, and there seems very cogent reasons for a return to the former rule above stated, at least to the extent of assessing lands for the construction of a drainage system from which seepage or percolation damages or injures other lands. The early settlers of the arid regions were not confronted with the question of drainage, but time and experience have proven that a drainage system is absolutely necessary where large areas of desert land are reclaimed by irrigation. \* \* \*

It is a well-recognized rule of law that an owner of property ought not to be permitted to use it to the injury of the property of another, but *recognizing that there are some injuries which result in damages for which compensation can not be recovered in an action in court*, we are satisfied that the legislature has full authority under the Constitution to provide for assessments and make all property subject to such assessments that is *physically responsible* for damages that result from acts for *which no legal responsibility under an action to recover damages attaches*, and that the legislature has done so under and by virtue of the drainage laws enacted by it. \* \* \*

It is clearly the policy of the State to have the *great irrigation schemes of the State so conducted as not to ruin thousands of acres of fine agricultural land* and bankrupt the owners and leave them remediless. (In re Drainage Dist. No. 1 of Canyon County, 161 Pac., 315, 320, 321; 29 Idaho (1916), 393, 395.)

The importance of the above-quoted views was materially decreased after rehearing (161 Pac., 321, 323); but was thoroughly reestablished by the later case of Burt et al Drainage Commissioners v. Farmers Coop. Irr. Co. (168 Pac., 1078; 30 Idaho (1917), 752). The court, after quoting from the former case, declared:

By section 9a the purpose was to require lands on higher levels, on which irrigation water might be brought by artificial means, and which contributed to the swampy condition of lower lands by seepage and the percolation of water through the soil, to be assessed in a just amount for the construction of drainage works for the reclamation of such lower land. It is probable that the legislature was not considering the question of legal liability for damages at the suit of private individuals, and certainly it was not considering the question as to whether the seepage and percolation was due to negligence of the person bringing irrigation water upon the higher lands. By section 9a it is provided that such high land shall be considered as being "benefited" to the extent and in the amount such lands are responsible for damages to low lands from seepage and saturation by irrigation water. *We have no doubt of the power of the legislature to provide that lands which by reason of artificial irrigation contribute by seepage and saturation to the swampy condition of lower lands shall contribute their just proportion of the cost of the construction of drainage works for the reclamation of such lower lands.* (Id., p. 1082.)

This rule as regards the assessment of high lands has not been enjoined upon irrigation districts by the Idaho Legislature, but the force of circumstances and the reasoning which has been adopted would seem to impel such an outcome, either as the result of judicial

or legislative action. The irrigation district, being a corporation municipal in character which would more often as a matter of local development comprise both high lands and low is certainly fully as appropriate an agency for the taxing of the entire irrigation project for relief against seepage as is the drainage district.

*Situation in other States.*—The Idaho doctrines have been dwelt upon fully for the reason that they are deemed to point the way toward a solution of a question exceedingly vexing in almost every section where irrigation is practiced. Reforms can not be made without the cooperation of both legislature and courts, but it seems to be evident that the relief is susceptible of being worked out so as to save large areas of valuable lands without undue discrimination.

The problems of seepage and percolating waters are among the most difficult in engineering and local operations as well as in law, on account of the lack of exact knowledge of the causes and effects which influence the course of water beneath the surface of the ground. Nevertheless, general justice may be reached in the apportionment of the costs of drainage upon the basis of responsibility outlined in the above-quoted decisions, which will about as closely approximate the ideal as is attained in most human relations. The duty devolving upon boards having the assessments in hand is of course a difficult one, but the difficulties are not insurmountable.<sup>1</sup>

The supposed unwillingness on the part of owners of higher lands to sustain their share of the drainage costs is unduly emphasized in the minds of many. With the means provided by which the upper owners in a mass will be brought in, the district is enabled in most localities to receive the support of a sufficient proportion of the farmers enjoying higher elevations to assure the cooperation necessary to obtain success. The removal of unsightly and insect-breeding marsh and tule lands and freedom from the fear that the seepage may rise eventually to higher elevations, together with local pride and community spirit, and the settled fact that the irrigation of the higher lands, by which their farming is made practicable, contribute more than their proportionate share to conditions making the drainage necessary, are certainly arguments which appeal to all public-spirited farmers, even though the present loss of crops may not exist as an argument with those more fortunately situated.

There is sufficient statutory basis in most of the Western States for a declaration in harmony with the views of the Idaho Supreme Court that drainage works needed for irrigation projects may be constructed by irrigation districts. But the present status of the irrigation district law is not such as to make it safe to predict what view will be taken by the courts as to the assessment of the higher lands not directly menaced by seepage for the drainage of the district as a whole. The Idaho decisions and the drainage district provision represent advanced judicial and legislative thinking but are likely to be followed in other States, since the problem is an urgent one and uniform in its main features throughout the irrigated belt.

*Security against future seepage losses.*—No means has been devised whereby a district can enter into a contingent liability for the protection of creditors to the end that if and when seepage difficulties

<sup>1</sup> The extent of the discretionary power devolving upon boards of directors in this matter is outlined below (p. 62).

may arise the district will protect the bondholders by assuming the necessary debt and by the construction of an adequate drainage system.

Persons loaning to the owners of irrigated lands upon long-time security, whatever the form of irrigation organization may be, where irrigation has not been practiced long enough to show that artificial drainage will not be required should ascertain not only the usual facts but also the existence of the necessary topographic conditions for the construction of drainage works.

Creditors unquestionably have a strong element of security in the fact that the landowners must supply the necessary drainage facilities unless they are prepared to lose their entire property. The persuasiveness of this argument of self interest is, of course, dependent upon the feasibility of drainage and upon the existence of a reasonable margin between the value of the land and the existing indebtedness. When seepage troubles arise upon a project where an irrigation district with powers of drainage has been formed the solution of some of the most important of the usual difficulties has been provided in advance. The ability to cooperate has been locally recognized and developed, the vehicle for such cooperation as is necessary has actually been tried out, and sentiment has acquiesced in its machinery for collection and operation. Thus the risk of divided counsel and of local disunion, which is the principal cause of irrigated sections being ruined by seepage, is eliminated in advance wherever the irrigation district has been formed upon a project.

Therefore, the creditors loaning upon lands within an irrigation district have a strong moral security which is absent in the case of any irrigated section not organized as a public or quasi-municipal corporation. Moreover, the soundness of the doctrine developed by the Idaho courts that irrigation districts are not only authorized to provide drainage for district lands when the need arises, but that they are under a duty to do so, is practically certain to meet with the early and increasing favor of the other States.<sup>1</sup>

#### INDEBTEDNESS OF IRRIGATION DISTRICTS.

An irrigation district is a creature of statute, and as such is limited in its powers by the act under which it is brought into being. We quote from the Supreme Court of California as follows:

An irrigation district is a public body, and under the Wright law has only such powers as are given to it by that act. Such powers are enumerated in the act. \* \* \* From the foregoing it is quite apparent that the purpose of the Wright Act is to enable an irrigation district to construct, or acquire by purchase or condemnation, or by all of said methods combined, when necessary, a system of canals and waterworks which shall be the property of the district and under its control; that the board of directors have power to acquire such waterworks in the manner aforesaid, and to issue the bonds of the district in payment therefor; and that the board has no other powers except those which are expressly given or are implied as necessary to carry out the main purpose of the act. (*Stimson v. Alexandro Irr. Dist.*, 67 Pac., 496, 497, 498; 135 Calif., 389.)

<sup>1</sup> The reader may be interested in discussion of drainage problems below, pp. 53, 72, 80.



Further emphasizing the limited character of the powers to be exercised by irrigation districts the original Wright Act of California contained, in section 42, the following provision:

The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred, in excess of such express provisions, shall be and remain absolutely void.

While such would probably be the doctrine of the courts, irrespective of statutory declaration, the clause above quoted has many times been referred to by the courts. This provision has been adopted, generally verbatim, by practically all of the irrigation district laws.

The Supreme Court of Nebraska in the case of Paxton Irr. Dist. v. Conway (142 N. W., 797; 94 Nebr., 205), after quoting this provision, says: "In acquiring bonds appellants were bound by this statute and were required to respect the limitations of the officers of the irrigation district," and this was held to be the case, although the officers themselves had failed in this instance to respect the limitations of the authority conferred upon them.

#### BONDED DEBTS.

The principal purpose of irrigation district organization is the construction of the necessary works and, aside from contract with the United States Government for the financing of a Federal project, as above described, that purpose as a rule can only be carried out by means of the authorization and issue of bonds. Therefore, under most statutes it is not discretionary but incumbent upon the board of directors, immediately after their election, to prepare plans and estimates for construction work.

When such work has been performed to the satisfaction of the board, the directors must call an election to decide the question whether or not the proposed bonded indebtedness shall be incurred. Notice of election is required to be given in a manner expressly prescribed, generally both by publication in local newspapers and by posting of notices in the various election precincts.

As in the case of other proceedings under these statutes, the authorization of bonds is a proceeding in rem, so that jurisdiction is secured without personal service by compliance merely with the statute as to publication. While the statutory method of publication in lieu of personal notice must be substantially followed, in order that the election may be valid, many of the statutes expressly provide that informalities in the matter of election will not vitiate the result if the election shall have been otherwise fairly conducted. Failure to follow the law as to the giving of notice is not to be deemed an informality.

The majority required to carry the bonds differs in various States from a bare majority to two-thirds. It is not generally necessary that a majority of all qualified electors be obtained, but merely that a majority of those who vote favor the indebtedness. But in New Mexico there must be cast in favor of the bonds a majority of the votes of the resident freeholders owning in the aggregate a majority of the number of acres held by such freeholders.

*Purposes for which bonds may be issued.*—The purposes for which bonds may be issued differ among the States; in several the construc-



tion or acquisition of the necessary works, property, and rights, and payment of the first year's interest upon the bonds are the objects prescribed. Under one statute the purposes are the "construction, reconstruction, betterment, extension, or acquisition of the necessary property and rights therefor." The general phrase "and otherwise carrying out the provisions of this chapter" is common, and it is generally provided that "whenever thereafter the fund for any such purpose has been exhausted by, or shall appear to be inadequate to meet the expenditures herein authorized therefrom" the board must call another special bond election. In an Oregon case it was held that the authority to issue subsequent bonds where not expressly given may be found by implication from the statute as a whole. (*Justice King in Hall v. Hood River Irr. Dist.*, 110 Pac., 405; 57 Oreg., 69.) Bonds are generally authorized to be deposited with the United States as security that the contractual plan entered into with the Federal Government will be wiped out.<sup>1</sup>

*Discussion of unlawful purposes.*—The provisions of law as to the objects for which bonds may be issued is a matter of great importance. The bond issue can not be employed in management and salaries or otherwise diverted from the objects of the statute, to quote from another California case:

The directors have no authority to appropriate the bonds which the electors have voted to issue for the construction of the irrigation works to the payment of salaries or expenditures incurred in the management of the property. If, instead of selling the bonds, as directed by section 16, they could use them for these purposes, the provisions of section 41 would be futile; and, under an improvident or reckless board of directors, the bonds which had been voted for the purpose of raising "money" with which to construct a canal, might be frittered away in useless expenditures and salaries, and the district receive no benefit whatever. (*Hughson v. Crane*, 47 Pac., 120, 122; 115 Calif., 404.)

Certain blocks of bonds were declared invalid—

If the bonds were issued to him in violation of the statute, they can not in his hands be valid obligations against the district, even though they were taken in payment for his work. The law is well settled that one dealing with a municipal corporation is charged with a knowledge of all the limitations upon the power of its officers, and that he can have no right of action upon its written obligation if it was entered into in disregard of statutory requirements. (*Id.*, p. 124.)

In the case of *Stimson v. Alesandro Irr. Dist.*, quoted above, certain bonds issued to purchase certificates as evidence of the right to a supply of water to be acquired by the irrigation district were held void. The language of the act having stated the purposes for which bonds may be used, the addition to the stated purposes for which bonds may be issued of the words "and otherwise carrying out the provisions of this act" did not avail to validate the exchange. It was held that the irrigation district "in return for its bonds never got any part of any canal, canals, waterworks, or any real property or any tangible property whatever. They received merely the personal promise of the Bear Creek Co. to lend certain water."

It was furthermore held that the supposed confirmation of the bonds would not avail to validate the transaction since, for such a transaction, the court lacked jurisdiction to validate bonds.

<sup>1</sup> In practice, however, the authority to deposit bonds with the United States has been utilized in the case of only four districts, all being in Washington, to an aggregate of about \$1,000,000.

A similar case is that of *Leeman v. Perris Irr. Dist.*, wherein an exchange of bonds for water-right certificates was held void, the court stating as follows:

To depart from the express provision of the act might lead to mischievous consequences. One bidder might be willing to do certain construction work at a certain price for cash, but would be unwilling to take bonds at any value, while another competing bidder would get the same work at a greater price because he was willing to take the bonds in payment at an agreed value. There could be no fair competition under such circumstances. The evident intention of the act is that bonds must be sold (except in the single instance of exchange for property) to the highest bidder in open market for cash, and that construction work must be done on the best terms for cash. One who purchases bonds, knowing that they were negotiated in a manner not authorized by law, is not a bona fide holder, but takes them subject to any defense existing against them. (74 Pac., 24, 25; 140 Calif., 540.)

The same result has been reached by the circuit court of appeals for the ninth district (in 1917) in the case of *Rialto Irr. Dist. v. Stowell* (246 Fed., 294), an exchange of bonds therein being held invalid.

That an exchange of bonds may be valid, however, is shown by the case of *Stowell v. Rialto Irr. Dist.* (100 Pac., 248; 155 Calif., 215). It is therein held that the only mode in which the board can exercise its powers in the disposal of the bonds so as to render them valid obligations of the district under the California act (that of 1887 under which the district was organized), is to exchange them for property at their full value or to sell them in the open market at not less than 90 per cent of their face value. The distinction between this case and the preceding cases is that actual property was held to have been obtained as the result of the exchange.

The foregoing cases relate to the rights of the original purchasers of bonds and distinctly except the rights of later bona fide holders, and it is evident that while the original purchaser is charged upon his peril to make sure that the purpose for which he takes the bonds is one for which the district directors have the power to utter the security, subsequent purchasers are entitled to the same rights as bona fide purchase of other negotiable securities. They are under no obligation to assure themselves of the history of the issuance of the bonds or of the lawful character of the consideration given therefor to the district. If the bonds are authorized by the law and executed in accord with the statute they are protected. That this doctrine applies in cases of this character where the rights of a bona fide purchaser are involved is evident from the case of *Baxter v. Dickinson*, collector of Vineland irrigation district (68 Pac., 601, 603; 136 Calif., 185). The court therein quoted from the United States Supreme Court the following passage:

"This court has uniformly held, when the question was presented, that where a corporation has lawful power to issue such securities, and does so, the bona fide holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of such recital." (Quoting from *Pompton v. Cooper Union*, 101 U. S., 196.)

It is evident that the statute should receive the most careful consideration, if any other transaction is proposed than the sale of the bonds for cash, in order that parties may, for their protection, make

certain that the purpose for which the bonds are to be employed is one which clearly falls within the purview of the statute.

*Form of bonds.*—The statutes generally prescribe certain recitals which are to be inserted in the text of the bonds, particularly with reference to compliance with the statute. These recitals are very important, since they are conclusive upon the district:

If the recital of "full compliance with all the requirements of the act" be held for naught, then it must necessarily follow that, notwithstanding the negotiable form of the bonds and the fact that title thereto passed by mere delivery, no value would attach to them, since their validity would always be open to contest as to the truth of a fact that the most diligent inquiry might fail to disclose. To so hold would, in our opinion, not only lead to disastrous consequences never intended by the legislature, but would render nugatory the provision that the bonds should be negotiable in form and also destroy the effect of the recitals required to be made therein. \* \* \* Vested with this power to determine what constituted "ful" compliance" and having so certified upon the face of the bonds, the district will not be heard as against a bona fide holder of bonds without notice of the alleged irregularity in the sale thereof, to say that the facts thus solemnly recited and upon which he innocently parted with his money are false. (*Ham v. Grapeland Irr. Dist.*, 158 Pac., 207, 211, 212; 172 Calif. (1916), 611.)

The statutes prescribe the maximum and minimum denominations of the bonds, and require that they be negotiable in form, executed in the name of the district and signed by the president and secretary and countersigned by the treasurer. The seal of the district is required to be affixed thereto, and the bonds are to be numbered consecutively as issued, bearing date at the time of their issue. Coupons for the interest must be attached to each bond bearing the signatures of the president and secretary, which by express provision in some statutes are lithographed. The bonds are required to declare upon their face that they are issued by the authority of the irrigation district law, stating the title and date of the approval thereof. The secretary must keep a record of the bonds sold, their number, date of sale, the price received, and the name of the purchaser.

Matters of form and execution are important, as may be seen from the following quotation:

The power of public corporations to issue bonds is to be exercised in the manner prescribed by statute. "There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed, they create no legal liability." *Anthony v. County of Jasper*, 101 U. S., 693; 25 L. Ed., 1005. (*Stowell v. Rialto Irr. Dist.*, 100 Pac., 248, 251, 252; 155 Calif., 215.)

*Terms of bonds.*—While numerous changes have been made in the terms imposed for the payment of bonds, the most common clause provides for a 20-year period, during 11 years of which no part of the principal sum is repaid. At the expiration of the eleventh year not less than 5 per cent of the principal of the whole amount and number of bonds is required to be paid, and yearly payments on the principal are made thereafter at a gradually increasing rate, which reaches 15 per cent for the nineteenth year. The balance, if any, is paid at the close of the twentieth year. Thus the annual interest burden each year after the eleventh lessens while the amount of the principal required to be met increases. The terms of repayment are mandatory:

Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter (*People's Bank v. School District*, 3 N. D., 496; 57 N. W., 787; 28 L. R. A., 642) or a longer term (*Norton v. Town of Dyersburg*, 127 U. S., 160; 8 Sup. Ct., 1111; 32

L. Ed., 85; *Barnum v. Okolona*, 148 U. S., 393; 13 Sup. Ct., 638; 37 L. Ed., 495) than that authorized are invalid." (Id., p. 252.)

Later statutes tend to give elasticity, and permit the district to issue bonds payable over different and generally longer periods of time and give elasticity to the matter in various ways.

The bonds must bear interest, generally at 6 per cent, payable semi-annually, and may be sold by the board under most statutes at 90 per cent of par value, though in some cases the requirement is not less than 85 or 95 per cent, and one or two statutes prohibit the district from disposing of the bonds at less than par.

*Negotiability.*—The courts have fully upheld the negotiable character which the legislatures have sought to stamp upon irrigation district bonds. The United States Circuit Court of Appeals for the Eighth Circuit in the case of *Shelton v. Gas Securities Co.* (239 Fed., 653, 659), said of irrigation-district bonds:

Obligations of this nature are subject to the same rules as other negotiable paper. (*Cromwell v. County of Sac*, 96 U. S., 51; 24 L. Ed., 681.)

"These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. \* \* \* Everything that tended to depress the market value was adverse to the object the legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued—contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view. \* \* \* Such an interpretation ought not to be given to the statute, if it can reasonably be avoided; and we think it may be avoided." (*Town of Colona v. Eaves*, 92 U. S., 484, 487, 488; 23 L. Ed., 579.)

The foregoing language of the Supreme Court has wide application and discloses the reasoning upon which this rule of estoppel is based.

While the "contingencies of fact" are no part of the necessary inquiry of a bona fide purchaser of irrigation district bonds, as pointed out by the foregoing quotation, yet the authority of law behind the securities is a matter as to which even the bona fide purchaser must at his peril assure himself.

As stated in the case of *Wright v. East Riverside Irr. Dist.*, in the same court:

The law is well settled that bona fide purchasers of municipal bonds take with notice of the law under which such bonds are issued. The plaintiff in error must therefore be held to have known of the provisions of the act called the Wright Act. (138 Fed., 313.)

It was also held in this case that where bonds are antedated so as to reduce the repayment period specified by law they are invalid in the hands of bona fide holders, and the court applies to irrigation district bonds in the hands of such holders the following statement of law by the United States Supreme Court:

Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it. (Id., p. 322, quoting from *Antony v. County of Jasper*, 101 U. S., 693.)

The rights of bona fide holders of irrigation district bonds have been passed upon by the United States Supreme Court in the case of *Tulare Irrigation District v. Shepard* (185 U. S., 1). In this case the

landowners had interposed no objection to the action of the board of supervisors in establishing the irrigation district, nor to the election held upon organization, nor to the authorization of the bonds, and pursuant thereto assessments had been made and levied for a period of three years. It was held as follows:

Under these circumstances and by reason of the statute and the recitals in the bonds, we think the landowner is estopped from setting up the defense of the want of notice as against the plaintiff in this case, because he is a bona fide holder for full value without notice, and because the landowners acquiesced in the issue of the bonds and have received the full benefit of their proceeds. (Id., p. 19.)

Irrigation district bonds are nevertheless negotiable, although under the statute and by their express terms they be payable out of a particular fund of the district. The technical rules of the law merchant to the contrary are modified for this type of security by the law which declares the bonds negotiable in character. (*Kinkade v. Witherop*, 69 Pac., 399, 401; 29 Wash., 10.)

*Security behind the bonds.*—As will be noted from the discussion of the methods of assessment and levy, undertaken below, the entire landed value is subject to assessment for district purposes, and in the context relating to bonds the statutes contain substantially the provision that the bonds and interest shall be paid by revenue derived from an annual assessment upon the real property of the district, and that "all the real property in the district shall be and remain liable to be assessed for such payments."

Some statutes make additional provision that the bonds shall become a lien upon all the water rights and other property acquired by any district and upon its canals, waterworks, and other property, giving the right to the holders of bonds to take possession of the property of the district and to control the same until the lien can be enforced in a civil action by foreclosure. (*Remington Codes and Statutes of Washington*, sec. 6432, and *Oregon Laws of 1917*, p. 757.) In many cases such possession would be as much a liability as an asset, for it would unquestionably be burdened with the duty of delivering water to the farmers. Be this as it may, it should be noted that the Supreme Court of California has held a provision in the amendatory act of 1893 that a board of directors of a district shall have the power to pledge by mortgage, trust deed, or otherwise, all property of the district as additional security for the payment of bonds to be unconstitutional. The view was taken that this provision would be in contravention of the constitutional prohibition against the delegation of the possession and management of the property of public corporations. (*San Diego v. Irr. Dist.*, 77 Pac., 937; 144 Calif., 329.)

The Federal Circuit Court of Appeals for the Ninth District in interpreting the California act, has decided that the irrigation district bonds "constitute a general obligation of the irrigation district to pay the principal and interest thereof as therein provided for, and that a bona fide holder of such bonds is not limited to any particular fund." (*Rialto Irr. Dist. v. Stowell*, 246 Fed., 294, 305 (1917).) The court quotes, from a decision of the Supreme Court of the United States as applicable to irrigation district bonds, the following statement:

Experience informs us that the city would have met with serious, if not insuperable, obstacles in its negotiations had the bonds upon their face, in

unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved. If the corporate authorities intended such to be the contract with the holders of the bonds, the same good faith which underlies and pervades the statute of March 2, 1871, required an explicit avowal of such purpose in the bond itself, or, in some other form, by language, brought home to the purchaser, which could neither mislead nor be misunderstood. (Id., p. 305.)

In brief the tangible security behind irrigation district bonds consists of the total value of the real estate within the district benefited by irrigation, and this security is made available through the powers of taxation. These powers must be exercised by the executive officers of the district who may or may not be county officials as well. But this phase of the subject is presented below (p. 54).

*Immunity from taxation in California.*—The salability of bonds of California irrigation districts has been greatly increased for the local public, among the bonds of other classes of public and quasi-public corporations, by the enactment by the people of the State of the following constitutional amendment:

All bonds hereafter issued by the State of California, or by any county, city and county, municipal corporation, or district (including school, reclamation, and irrigation districts) within said State, shall be free and exempt from taxation. New section adopted Nov. 4, 1902, as sec. 1½ of Art. XIII.)

*Various doctrines protecting bondholders.*—The effect upon the bonds of proceedings for the exclusion of lands (p. 78) and for the dissolution of the district is discussed below (p. 85), as is also the construction which has been placed by the courts upon decrees in confirmation of irrigation district bonds (p. 47). These features, therefore, will not be treated at this point. There are, however, several additional safeguards which the courts have placed about irrigation district bonds following the underlying principles invoked in favor of the securities of public corporations in general, which should now be briefly outlined.

When irrigation district statutes are amended in some fundamental fashion, provision is frequently made that as regards indebtedness previously incurred the former law shall remain unchanged. (See *Harris v. Tabet*, 57 Pac., 33; 19 Utah, 328.) But irrespective of the statutory provision, under familiar principles the courts do not tolerate an amendment of an irrigation district act to be so construed as to lessen the security of the bondholders.

The irrigation district law constitutes in theory a contract between the State and those who have availed themselves of the act. The Supreme Court of California, in holding an amendatory act contrary to the constitutional prohibition against the enactment of any law impairing the obligation of contracts, expressed the following views:

The act providing for the organization of the district, and the organization of the district under the provisions of the act by the vote of its electors, can not be otherwise regarded than as a contract between the State and the individuals whose property was thereby affected. The contract, indeed, lacks one of the ordinary elements of contracts, namely, the actual consent of all the parties to it, but by the provisions of the statute, the majority of the electors were empowered to act and consent for the individual proprietors; and, unless this were a legitimate exercise of the powers of the State, the statute itself would be invalid. (*Merchants' National Bank of San Diego v. Escondido Irr. Dist.*, 77 Pac., 937, 939; 144 Calif., 329.)

In Oregon an amendatory act changed the officers by which assessments were made, and altered the method of assessment from a flat



rate per acre to the beneficial rate. These changes were held to be legislative questions "with which we have nothing to do, and, standing alone, these changes have no bearing upon the obligations of the bonds." The law, however, furthermore so changed the times of collection and delinquency that the necessary funds would not be available for the payment of interest upon the bonds at the proper time. The court held that this amendatory provision, if made effective as regards the assessments to meet the bonds previously issued, would impair the contract of the bondholders, and reached the conclusion that "therefore, the amendment can not apply to obligations existing at the time of the enactment." (*Gibbons v. Hood River Irr. Dist.*, 133 Pac., 772; 66 Oreg. (1913), 208.)

The status of irrigation districts when acting as de facto corporations has already been touched upon (p. 17). The trend of the decisions is toward recognizing as valid bonds of these de facto irrigation districts. In the case of *Miller v. Perris Irri. Dist.*, 99 Fed., 143, a decree was granted declaring the proceeding for the organization of the irrigation district void. This, however, was held not to impair the obligation of the bonds, since the district had been exercising the powers under the law as a corporation in fact. The court held as follows:

From the doctrine thus announced it follows, in my opinion, that the judgment set up in the supplemental bill, declaring void the proceedings for the organization of the Perris irrigation district, does not impair the validity of, nor afford any ground for equitable relief against, obligations incurred prior to said judgment. (*Id.*, p. 150, citing *Shapleigh v. City of San Angelo*, 167 U. S., 646, and other authorities.)

The Supreme Court of the United States has held that, irrespective of a decree in confirmation and aside from the rights of the bondholders as bona fide purchasers, both the landowners and the district must make timely objection to the issuance of bonds if their attack is to avail.

The court declined to consider the defects in the organization which were urged as rendering the formation of the district invalid, and held as follows:

In addition to the strength of the position of the plaintiff in the action as a bona fide purchaser and holder of the bonds, the position of the defendants merits due consideration. Regarding the individual defendants, it is scarcely possible to believe that they were not aware of the proceedings above recited taken to organize the corporation, and thereafter to issue its bonds, even though it should be admitted that the published notice was not legally sufficient to comply with the statute. They were the owners of land within the proposed district. The proceedings were all of a public nature, and two public elections were held within the district before the bonds were issued. Of these facts, already detailed, we say it is impossible to believe that the individual defendants did not have knowledge at the time of their occurrence, and yet they took no action to prevent the issuing of the bonds or to call in question by the slightest hint the validity of the organization of the district as a corporation. On the contrary, they entirely acquiesced in all the proceedings leading up to their issue, in obtaining the moneys therefrom, in the expenditure thereof for the purpose for which the bonds were issued, and in paying during several years the assessments made upon the lands within the district for the purpose of paying the interest on the bonds which had been issued. (*Tulare Irrigation District v. Shepard*, 185 U. S., 25.)

Officers of an irrigation district are trustees, and are within the rules of law governing fiduciaries in their administration of irri-



gation district funds. To quote from *Thompson v. Emmett Irr. Dist.*, 227 Fed., 560:

The officers of the irrigation district stand in the relation of trustees for the bondholders of the district. The moneys collected by them from the taxpayers for the payment of the interest on the bonds constitute a trust fund which can not be applied or diverted to any other purpose. They have collected money from the taxpayers for the payment of the interest on the bonds of the district, and they are not applying that money to such purpose. \* \* \*

\* \* \* They may be sued at law for money had and received, but they may also be sued in equity for breach of trust if they have failed to perform their duties as trustee. (*Id.*, pp. 566, 567; Circuit Court of Appeals, Ninth Circuit, 1915.)

*Confirmation of bonds.*—All the statutes provide for proceedings in local courts, either discretionary or mandatory upon the board, for the confirmation of the proceedings, for the authorization of the bonds, and the organization of the district. Since the scope of judicial confirmation in irrigation district laws has broadened to include several matters other than the issuance of bonds, it has been deemed better to treat confirmation as a matter for discussion separate from the subject of bonds. The reader should accordingly examine the material offered under the head of "Confirmation proceedings" in this connection, as he will find one of the most important safeguards of the bonds outlined thereunder.

*Registration and certification of bonds.*—It is obviously to the advantage of both the irrigation district and the public to throw every possible safeguard around the bond issues, at once protecting the holders of the bonds and giving the district paper a stability in value and a standing in the financial markets.

About half of the States have adopted some method whereby the bonds of the district, after being confirmed by the court, are registered and certified by some agency of the State or county, generally the county treasurer or the State engineer. This action is made compulsory in some States, it being provided that no bonds shall be valid unless they are registered and bear the indorsement of the proper officer showing compliance with the law. The certificate is indorsed upon or attached to the bond, and is always available as evidence that the forms of law have been observed in its issuance.

These statutory certification requirements are of two classes. In the majority of the States which require certification it is provided that a State or county official named shall certify upon the bonds that the district has taken the statutory steps necessary before bonds are authorized, generally including judicial confirmation. It does not mean, however, that the certifying officer has investigated the standing of the irrigation project as a feasible undertaking, nor the bonds as a legitimate and safe investment. Landowners might in several of the States organize an irrigation district and comply with the forms of law without any supervision having been given to the district from the standpoint of feasibility.<sup>1</sup>

In Colorado the State treasurer may invest certain State funds in the bonds of irrigation districts which have been legally confirmed, but only after the State engineer has certified that the works so financed are completed for the successful irrigation of the district.

<sup>1</sup> Protection against this contingency is furnished by several States in the requirement that the State engineer shall be called upon to perform certain functions described in this discussion (p. 16).

Not more than 10 per cent of the total bond issue of any one district may be so purchased. (Mills Ann. Stat., 1912, sec. 5808.)

*Same—Certification of project feasibility.*—A certification plan has been adopted in California and Oregon, however, which offers to the investor not merely security that the law has been complied with, but also assurance as to the character of the investment by the State engineer, the attorney general and superintendent of banks following an investigation of the project.

Steps looking to certification are discretionary with the board of directors, who may refer to the commission the question of the eligibility for certification of any outstanding or contemplated bond issue. In the provisions as to the commission's investigation emphasis is laid upon matters of the soil, the reasonable market value of the land, the irrigation works, and the water rights of the district.

After due investigation, the commission submits a written report to the State controller. If the report shows that the project for which the bonds are proposed is feasible and that the aggregate amount of bonds under consideration with any outstanding bonds of the district does not exceed a specified percentage limitation (60 per cent in California and 50 per cent in Oregon) of the total market value of the lands within the district the water rights and irrigation works owned by the district, or to be acquired or constructed with the proceeds of any bonds of the district, the bonds will be entitled to certification by the State controller up to an amount named in the report of the commission as the lawful percentage limitation.

The certificate of the State controller is attached to the bonds. It states in effect that the bonds have been approved in accordance with the act of the legislature as legal investments for all trust funds and for the funds of all insurance companies, banks, and trust companies (and in California, State school funds also); that they may be deposited as security for the performance of any act whenever bonds of any county, city, or school district might be so deposited; and that they may be used as security for the deposit of public money in banks in the State.

Subsequent issues of bonds may be made available for certification upon like proceedings by the same district, but after any of the bonds of a district have thus become entitled to certification by the State controller, it is declared unlawful for such district to issue bonds that will not be entitled to such certification.

California further provides that no expenditure of any kind shall be made from the construction fund of a district after its bonds have been certified as legal investments without the consent of the commission: and that no obligation may be incurred against said fund without the previous authorization of the commission. No expenses of any kind may be incurred by such district in excess of the money actually provided by levy and assessment or otherwise. (Gen. Laws, Oreg., 1917, pp. 777-780; Calif., act of June 13, 1913, amended L., 1917, p. 582.)

Such a law offers much in the way of security against efforts in the nature of wildcatting and speculation at the expense of the investor and represents unquestionably a bona fide effort to enhance the standing of the irrigation securities in the market. The likelihood of the owners of land embarking upon an irrigation project and securing the formal cooperation of local county officials and selling bonds under

conditions of doubtful feasibility is much greater than is the probability of high State officials indorsing, after investigation, an enterprise having insufficient basis.

*Sale of bonds.*—Bonds of the character above outlined may be sold from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of works, after resolutions declaring the intention to sell a specified amount. Thereupon, in some States the directors may sell without advertising for bids if a sale can be made at not less than par. In other States the board must publish notices of the sale and ask for proposals to purchase the bonds. It may then award the bonds to the highest responsible bidder, or it may reject all bids. In the latter event, the board may sell at private sale or may exchange the bonds for materials or labor in connection with the construction of its works.

Frequently there is no limit to the price which the board may accept for the bonds where properly advertised bids have been received, but the majority of States fix a minimum price, ranging from 85 to 100 per cent of the par value of the bonds. Some of the States, however, provide that neither at public nor private sale or exchange can the bonds be sold for less than their par value and accrued interest.

*Retirement of bonds before maturity.*—In some States express authority is given for the liquidation of bonds before maturity, as funds become available for that purpose.

The most common provision is that whenever, after 10 years from the date of the bond issue, the fund for the payment thereof amounts to the sum of \$10,000 the district may advertise for proposals for the redemption of bonds. The lowest bid is accepted, but in case the bids are equal the lowest-numbered bonds are given the preference. No bonds may be redeemed at more than their face value with accrued interest. In case none of the holders of the bonds wishes to sell, the money in the bond fund is invested in United States go'd-bearing bonds or in the bonds of the respective States, which shall be kept in the bond fund and used to redeem the bonds whenever the holders thereof desire.

*Refunding bonds.*—In the course of time a district may find itself so situated that it would be highly advantageous to renew its bonds or, through negotiation, to recall them and substitute other securities bearing a smaller rate of interest or maturing at a different date.

By a grant of power to issue original bonds the authority to issue refunding bonds is not implied. (28 Cyc., 1582.) In the absence of express statutory enactment on the subject, therefore, the district is powerless to avail itself of any opportunity to improve its condition in this manner.

Some of the States have provided for this contingency, but there is a lack of uniformity in the various statutes on the subject.<sup>1</sup> Generally speaking, where such statute exists the board of directors of the district is empowered to initiate proceedings looking toward the issuance of refunding bonds whenever it deems such action necessary. The question of the issue of the bonds is then submitted to the vote of the district after notice. Some States permit the directors to

<sup>1</sup> Refunding bond laws will be found as follows: California, Deering Gen. Laws, Act 1727; Colorado, L. 1915, p. 319; Oklahoma, L. 1915, pp. 536-538; Texas, L. 1917, p. 209; North Dakota, L. 1917, p. 160; South Dakota, L. 1917, p. 587.

decide the matter after due notice of hearing and afford an appeal to the courts.

Generally, the provisions are somewhat elastic, the manifest purpose being to permit the district a proper latitude in the matter of securing suitable terms for the refunding issue. For instance, in Colorado the date of maturity of the various series of refunding bonds may be determined by the district within the rather wide range of from 10 to 50 years, with the authority in the district, at its option, to issue bonds containing the provision that they may be paid at any time.

Refunding bonds may not be issued for a larger amount than the obligations to be retired thereby, nor may they bear interest greater in rate or amount per annum. The purpose of their issue should appear on the face of the bonds and the bonds in lieu of which they are issued must be canceled as they are taken up.

The bonds may either be sold to the highest bidder, after due notice of sale, and the proceeds applied to the payment of the outstanding indebtedness proposed to be retired or they may be exchanged for such outstanding bonds or other evidence of indebtedness. Neither by sale nor by exchange, however, may the bonds be disposed of for less than par. All refunding bonds not used for the purposes for which they were issued must be canceled.

Special taxes are levied to redeem refunding bonds, and the collections thereof are kept in a separate fund until applied to that purpose.

*Effect of changes in district upon bonds.*—The laws provided for the inclusion and exclusion of lands subsequent to organization and for the dissolution of the district. The status of outstanding bonds, in case of proceedings for change of boundaries and for dissolution will be found discussed later in connection with such proceedings (pp. 78 and 85).

#### INDEBTEDNESS NOT BONDED.

The States generally have placed a limitation upon the amount of current and other indebtedness, not secured by bonds, which may be incurred by the directors without the concurrence of the electors.

Several States expressly provide that the directors may contract obligations and issue warrants on behalf of the district in connection with the organization thereof or in making surveys or investigations to determine the feasibility of the proposed irrigation project for not to exceed a specified sum or a certain amount per acre of the lands proposed to be irrigated.

In most of the States, however, there is a general provision to the effect that the directors may acquire or purchase any or all property necessary for the use of the district, and where the consideration to be paid for such property is not more than \$10,000 the board need not secure the concurrence of the electors.

But where the consideration to be paid is in excess of \$10,000 and less than \$25,000 the contract must be ratified in writing by at least one-third of the qualified electors according to the number of votes cast at the last election. No contract in excess of \$25,000 may be made without being first authorized by an election held in the same manner as is provided for elections on bond issues.

In California, Montana, and Washington the rule is more scientific, the limitation being based upon the acreage of the district involved. The provision in the first-named State is that contracts amounting to more than \$10,000 in districts of 50,000 acres or less, and contracts of more than \$50,000 in districts of more than 50,000 and less than 200,000 acres<sup>1</sup> are not binding upon the district until a favoring petition of the majority of holders of title, representing a majority in value of the acreage of the lands therein, has been filed with the board. As an alternative the petition may be signed by 500 electors representing not less than 20 per cent in value of the lands of the district. (L. 1917, p. 757.)

The provision of Montana, however, is more elastic. There the district board may in any one year incur obligations for organization and general purposes in an amount not to exceed \$1 for each acre of land within the district (L. 1913, p. 476), while in Washington (L. 1917, p. 735) the directors may in cases of emergency incur any indebtedness not exceeding in the aggregate a sum equal to 15 per cent of the total amount fixed as rates, tolls, charges, and assessments for the current year for the care, operation, maintenance, repair, and improvement of the irrigation works of the district.

Without entering upon a discussion of what latitude should be allowed to boards of directors in the matter of pledging the credit of the district without the prior consent of the electors, it is believed to be obvious that a provision basing the power to incur liability upon the acreage of the district or upon the amount of its assessments is preferable for the reason that it adjusts itself much more completely to the probable needs of all classes of districts than a fixed limitation imposed without regard to the size of the district.

*Warrants.*—Claims against an irrigation district, other than those represented by its bond issues, are submitted, generally under oath of claimant, to the board of directors upon vouchers or other proper forms. When approved by the board warrants signed by the president and countersigned by the secretary are issued, stating the date on which they were authorized by the board and for what purpose. They are then paid by the treasurer upon presentation to him. But if funds are not available, indorsement is made and the warrant draws interest from that date until paid or until notice that funds are available for payment. When there is \$100 or more in the hands of the treasurer available for the retirement of the warrants, it shall be applied to their payment.

The district treasurer must keep a record of the warrants presented for payment with the date of presentation, and when funds are available they must be paid in the order of their presentation.

It is provided in some States that no irrigation district may issue warrants in any one year in excess of 90 per cent of the levy for such year; but in case of due and outstanding obligations against the district on account of operation and maintenance or current expenses incurred prior to the year for which any levy is made, the district board may make an additional levy, within certain specified limitations, to create a special fund for the payment of past due obligations.

While the foregoing general statement represents the statutes of

<sup>1</sup> There is, however, unfortunately an ambiguity at this point in the act and a confusion exists in the requisite acreage.

those States which have passed detailed enactments on the subject, there are a number of legislatures which have contented themselves with less comprehensive laws. Several, for example, merely prescribe that disbursements by the district treasurer shall be made only upon warrants or orders signed by the president and countersigned by the secretary of the district.

On the other hand, Oregon, in addition to general provisions about as outlined above, limits the total amount of outstanding warrants for the payment of which there are no funds immediately available to the sum of not to exceed \$1 per acre.

Colorado authorizes the retirement of warrants by an issue of bonds in lieu thereof in all cases wherein bonds might lawfully have been issued in the first place. The issue of bonds to replace warrants previously issued is subject to the general rules governing the authorization of bonds. (See *L. Oreg.*, 1917, p. 761; *M. A. S. Colo.*, 1912, sec. 3979a.)

Irrigation district warrants have been held not to be negotiable instruments in the sense of the law merchant, and any defense which might properly have been urged against the original payee may be enforced against the assignee even though he be a bona fide purchaser. (*Danby v. Starlight Irr. Dist.*, 157 Pac., 1066; 80 Oreg. (1916), 619.)

#### CONFIRMATION PROCEEDINGS.

One of the most important features of the irrigation district law is the provision which has been made for securing a decree in confirmation of the acts of the district. The original "confirmation act" was adopted by California in 1889 as an enactment supplemental to the irrigation-district law. Similar confirmation acts were adopted in all States having irrigation-district laws.

*Object.*—The intention is to eliminate fraud and to give irrigation-district bonds a better standing with prospective purchasers by the securing of judicial evidence of the regularity of the proceedings of the district, and by reducing the evidence to a judgment, through the doctrine of *res judicata*, to forestall all future questions as to the validity of the steps taken.

The purpose of the act of 1889, in providing for an adjudication as to the validity of the district, was to furnish a barrier against subsequent attacks upon the ground of such frauds in the organization of the district, and thereby to protect its bondholders. (*Fogg v. Perris Irr. Dist.*, 97 Pac., 316, 318; 154 Calif., 209.)

The object of the proceeding is, of course, to compel every person interested in the district and whose property is to be bound for the payment of its debts to come into court and within the time limited present and submit to judicial investigation any and all objections he may have to the regularity of the organization of the district and all other matters affecting the validity of the bonds, so that it may be finally and conclusively determined by a judgment which neither he nor his successors in interest can thereafter question, whether such bonds are legal and valid or not. (*Board of Modesto Irr. Dist. v. Tregea*, 26 Pac., 237, 238; 88 Calif., 334.)

*Scope of confirmation.*—While the scope of the confirmation act at first related solely to the issuance of bonds and conferred jurisdiction upon the court for the confirmation of organization proceedings only as incidental to the confirmation of bonds, the idea has developed in several of the irrigation-district States far beyond the bond feature.



In all of the laws, except those of Wyoming and Kansas, provision has been made for a decree in confirmation where contract is entered into between the district and the United States Government pursuant to the Federal reclamation laws. Several of the statutes expressly grant jurisdiction to the court to pass not only upon the validity of the steps taken to authorize the contract with the United States but also upon the validity of the terms of the contract.

Idaho has also provided for the confirmation of the apportionment of benefits to become the basis for assessments to be made and levied for district purposes. Utah and Nevada have followed Idaho in this provision. In New Mexico provision is made for the confirmation of assessments and awards of damages for drainage work and for proceedings for changes of boundaries. (See Idaho L., 1915, p. 391; Nev. L., 1917, p. 270; Utah L., 1917, p. 91; New Mexico L., 1917, p. 80.) In California provision has been made for the confirmation of assessments as well as of bonds. (Deerings General Laws, sec. 68, p. 696.)

The confirmation idea has been most broadly and beneficially amplified by the Oregon Legislature, wherein provision is made for the judicial confirmation of all proceedings provided for in the irrigation-district law. In that State the board is given discretion to bring confirmation proceedings for the organization of a district irrespective of any proposed bond issues or contract with the United States, or for proceedings for the inclusion or exclusion of lands, or to confirm the result of any general or special election, or any order levying any general or special assessment, or ordering the issue of any bonds. (Oreg. L., 1917, p. 773, sec. 41.)

The statutes sometimes merely permit and sometimes require the bringing of these proceedings, and in a few States where action is discretionary with the board any taxpayer may bring the proceeding if the board shall fail to do so.

*Statutory procedure.*—The statutory provisions for confirmation follow along similar lines in the various States. It is generally provided that petition be filed with the court by the district board praying for confirmation and stating that the district was duly organized and the first board duly elected, but not necessarily setting forth the facts showing such organization. After the fixing of time for hearing upon the petition the clerk of court must give notice of hearing, for a period generally of two or three weeks, notifying all persons interested to demur to or answer the petition on or before the date of hearing. The general rules of pleading and practice of the State are made applicable to this proceeding.

The proceeding is one in rem and constructive notice by publication without personal service has long been held to be sufficient. (Crall v. Poso Irr. Dist., 26 Pac., 797; 87 Calif., 140; Board of Modesto Irr. Dist. v. Tregoe, supra; Hanson v. Kittitas Rec. Dist., 134 Pac., 1083; 75 Wash. (1913), 297; Little Willow Irr. Dist. v. Haynes, 133 Pac., 905; 24 Idaho (1913), 317.)

*Jurisdiction of court.*—Upon hearing the court is granted jurisdiction to examine and determine the legality and validity of and confirm each and all the proceedings for organization and for the issuance of bonds and the sale thereof, or for authorization of contract with the United States or the proceedings for such other action as may be before the court for confirmation, with the power to con-



firm the proceedings in part and to disapprove and declare illegal such portion of the proceedings as shall be invalid. The court is generally expressly required by statute to disregard any error which does not affect the substantial rights of the parties if the proceedings shall have been otherwise fairly conducted. The latter provision is referred to by the Idaho Supreme Court as a command to place a liberal construction upon the irrigation district act. (*Nampa & Meridian Irr. Dist. v. Brose*, 83 Pac., 499; 11 Idaho, 474.) The irrigation district must sustain the burden of proof in confirmation proceedings. (*Fallbrook Irr. Dist. v. Abila*, 39 Pac., 793; 106 Calif., 355.) The court in the Idaho case last cited held that confirmation proceedings may precede the sale of bonds. (*Nampa & Meridian Irr. Dist. v. Brose*, 83 Pac., 499; 11 Idaho, 474.)

The right of review on confirmation proceedings is confined to the evidence contained in the record of the board and brought before the court. If the person controverting the findings of the board wishes to have the facts reviewed, he must cause a record of the evidence to be brought before the court. (In re Board of Directors of Wenatchee Rec. Dist. *v. Kimball*, 157 Pac., 38, 49; 91 Wash., 60.)

*Appellate proceedings.*—The earlier irrigation district laws provided for appeal from the decree in confirmation within the brief period of 10 days. The newer statutes have tended to grant a longer period for appeal. The limitation imposed by statute has been uniformly upheld by the courts. (*Palmdale Irr. Dist. v. Rathke*, 27 Pac., 783; 19 Calif., 358; *O'Neill v. Yellowstone, Irr. Dist.*, 121 Pac., 283; 44 Mont., 492; *Imperial Land Co. v. Imperial Irr. Dist.*, 161 Pac., 113; 173 Calif. (1916), 660.) All parties are precluded from objecting to the decree rendered unless appeal is taken within the period prescribed by the legislature. No period contained in any act has been held to be so brief as to be unreasonable and on such ground unconstitutional.

*Validity of confirmation proceedings.*—In the year following the passage of the California confirmation law the supreme court of that State considered the effect and constitutionality of the act and declared that the statute set up a proceeding in rem, and hence all the world is bound although personal service was not given of the adjudication. The decision was that of *Crall v. Board of Directors of Poso Irr. Dist.* (26 Pac., 797; 87 Calif., 140).

*Federal Supreme Court doubtful of decree.*—Shortly afterwards the case of *Modesto Irr. Dist. v. Tregua* (26 Pac., 237; 88 Calif., 334) was decided by the same court with identical effect as to the confirmation act. The defendant in the latter case, however, sued out a writ of error to the Supreme Court of the United States upon the ground that the operation of the statute resulted in depriving him of property without due process of law. (*Tregua v. Modesto Irr. Dist.*, 164 U. S., 179.)

Mr. Justice Brewer, rendering the majority opinion, declared that at the outset "we are confronted with the question whether, in advance of the issue of bonds and before any obligation has been assumed by the district, there is a case or controversy with the opposing parties, such as can be submitted to and can compel judicial consideration and judgment." (*Id.*, p. 185.) The court pointed out

that unless the board should proceed with the exercise of the power to issue bonds the labor of the court would be spent in determining "a barren right—a purely moot question," and took the view that the Federal Supreme Court is not concerned with any question as to what a State may require of its courts nor what measures a State "may adopt for securing evidence of the regularity of the proceedings of its municipal corporations," and moreover said:

It may well be doubted whether the adjudication really binds anybody. Suppose the judgment of the court be that the proceedings are irregular, and that no power has been by them vested in the district board, and yet notwithstanding such decision the board issues, as provided by the act, the negotiable bonds of the district, will a bona fide purchaser of those bonds be estopped by that judgment from recovering on the bonds against the district? The doctrine of *lis pendens* does not apply. Neither is any such adjudication binding in respect to negotiable paper unless the party purchases with knowledge of the suit or the decree. \* \* \*

But if a judgment in such a proceeding as this can not be invoked by the district as *res judicata* in an action brought against it by the holders of bonds thereafter wrongfully issued, can a judgment in favor of the power be invoked by the holder of such bonds as conclusive upon the district upon the ground of *res judicata*? In order to create estoppel by judgment must there not be mutuality? We do not mean to intimate that it may not have effect as evidence, like the certificate of an auditor declared by a legislature to be conclusive, but is it not simply as evidence and not as *res judicata*? \* \* \* (Id., pp. 187. 188.)

It should be noted, however, that the court did not approach the view that the confirmation proceeding was nugatory, although it declined to consider the doctrine of *res judicata* as applicable consequent upon the decree. The court's view is that the proceeding is a statutory method of securing evidence, and, from the context, apparently conclusive evidence, of the facts covered by the decree. To quote the conclusion reached:

It seems to us that this proceeding is, after all, nothing but one to secure evidence, that in the securing of such evidence no right protected by the Constitution of the United States is invaded, that the State may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and that unless in the course of such proceedings some constitutional right is denied to the individual, this court can not interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims. (Id., p. 189.)

Justices Harlan, Gray, and Brown dissented upon the ground that it was the duty of the Supreme Court to determine the Federal question raised by the pleadings and determined by the judgment of the State court, and further expressed the opinion that the conclusions of the State court should be sustained and its judgment affirmed upon the principles the same day announced in the case of *Fallbrook Irr. Dist. v. Bradley* (164 U. S., 112), wherein, as will be pointed out in the discussion of the general subject of constitutionality the irrigation district law of California was fully upheld.<sup>1</sup>

*State courts all uphold adjudication.*—Some critics have regarded the foregoing view of the United States Supreme Court as in the nature of obiter dictum, for the reason that the writ of error was dismissed for lack of jurisdiction rather than decided upon its merits.

<sup>1</sup> Both of these cases were decided by the Federal Supreme Court on Nov. 16, 1896.

Be this as it may, the opinion of Mr. Justice Brewer has been followed by none of the many decisions in State supreme courts upon appeal from confirmation proceedings below. In fact the view in Tregoe decision has been expressly repudiated by the Supreme Court of California after most careful consideration of the opinion in that case. The court makes the following statement:

It is to be regretted that the opportunity did not present itself to that court at that time to test the validity of the act in the crucible furnished by the Constitution of the United States, giving the act the construction placed upon it by this court. But by our decisions the constitutionality of the act has been directly and impliedly passed upon and approved more than once, and we will not now enter into a discussion of that question. (*People v. Linda Vista Irr. Dist.* 61 Pac., 86, 88; 128 Calif., 477; and see also *Title & Doc. Restn. Co. v. Kerrigan*, 88 Pac., 356; 150 Calif., 289.)

Quotation might be made from a score of State courts of last resort. Among the cases upholding the confirmation statutes, these may be noted: *Kinkade v. Witherop* (69 Pac., 399; 29 Wash., 10); *Nampa & Meridian Irr. Dist. v. Brose* (83 Pac., 499; 11 Idaho, 474); *Anderson v. Grand Valley Irr. Dist.* (85 Pac., 313; 35 Colo., 525); *Alfalfa Irr. Dist. v. Collins* (64 N. W., 1086; 46 Nebr., 411); *Hanson v. Kittitas Rec. Dist.* (134 Pac., 1083; 75 Wash., 297).

*Effect of fraud upon confirmation proceedings.*—The California case of *People v. Perris Irr. Dist.* (76 Pac., 381; 142 Calif., 601), left the law as to the effect of fraud in the formation of irrigation districts upon the confirmation decree in such shape as to afford diminished assurance to the creditors of these public corporations.

In the case of *Fogg v. Perris Irr. Dist.* (97 Pac., 316; 154 Calif., 209), however, the law was satisfactorily clarified in the conclusion reached, as follows:

It could not have been contemplated or intended that the existence of such fraud would always be open to inquiry, notwithstanding such adjudication, nor that, if subsequently shown, it would prove that the court, in the confirmation proceedings, had no jurisdiction to act at all, and that its decree was void. We think, therefore, that upon the face of the record, jurisdiction of the original proceeding was shown to exist, and that the fraud alleged, although sufficient to have made the organization invalid if shown upon the hearing of the proceedings for confirmation, was not sufficient to deprive the court in that proceeding of jurisdiction to make the adjudication which is here sought to be vacated. (*Id.*, p. 318.)

*Binding character of decree—Effect upon State.*—The confirmatory decree is held to have the broadest possible effect by all the State courts which have passed upon the question. The fact that no contest is made and that service is secured by publication does not diminish its binding character.

The Supreme Court of California holds that "such a judgment is binding upon the whole world." (*People v. Linda Vista Irr. Dist.*, 61 Pac., 86, 88; 128 Calif., 477.)

As regards the effect of a decree in confirmation upon the government of the State wherein the district is situated, it was held in the same case as follows:

We can not imagine a judgment in rem to which the State would not be a party. \* \* \* When we look at the purpose of this act, as indicated by its face and as more clearly indicated by the decisions of this court, it is apparent that there never was any intention upon the part of the State legislature that the State should be allowed by quo warranto, or in any other way, to attack the organization of these districts after a judgment of confirmation had been

had. If that could be done, then the entire confirmatory act is useless legislation—a mere nullity. (Id., p. 89.)

This doctrine has been followed by the State courts without exception. The Idaho cases of *Nampa & Meridian Irr. Dist. v. Brose* (83 Pac., 499; 11 Idaho, 474) and *Progressive Irr. Dist. v. Anderson* (114 Pac., 16; 19 Idaho, 504) may well be read. In the last-named case the proceedings were brought for the confirmation of the apportionment of benefit assessments.

## REVENUE.

### GENERAL.

*Provisions for revenue fundamental.*—The irrigation district law is primarily a means for carrying out irrigation plans and to that end for establishing between the district and its creditors fundamentally correct relations. As such the crux of the law obviously rests in the adequacy of the methods and the soundness of the basis for revenue which is provided.

In the relations between the debtor and creditor it is fundamental that the security of the creditor shall be primarily assured, and that the lands of the district in their entirety shall secure the debt. It is the province and duty of the district and its officers and the supervisory State officials, wherever there be such, to assume all the project hazards rather than to shift upon the creditors any portion of risks of the enterprise.

*Responsibility of district and creditors is not joint.*—It is difficult to conceive of an irrigation district system based upon any form of joint responsibility between the district and its creditors as to the feasibility of the plans or as to the management of district affairs. It is clearly the business of the local people to make themselves thoroughly conversant with the conditions of soil, climate, water supply, markets, and the effect of the engineering and legal difficulties, subject to supervision of State officials, and also to safeguard the expenditure of the moneys in construction work and in the general conduct of the project. So long as the district has complete control of the system they should bear full responsibility for its success or failure.

*A tendency to be avoided.*—There has been a tendency, however, in some quarters, to release tracts of land from liability upon payment of their proportionate part of the debt. This tendency has been shown in legislation in Montana and Colorado, and in a decision of a Federal district court in Colorado. Both the statutory provisions and the decision referred to will be discussed below under the head of assessment and levy. (Infra, p. 57.)

Any statutory provision or decision of court which tends toward lessening the security of the creditor by loosening the obligation which the district lands as a body owe to the creditors is pernicious. If there can be apportioned against tracts of comparatively small value, but still deemed irrigable, a proportionate part of the debt, and if, in case such tracts are unable to pay the assessments levied against them, the portion of the debt so assessed may not then be collected by assessments against other lands of greater value, the security of the creditors is greatly diminished.

*Importance as regards drainage.*—This is particularly important as regards drainage. As pointed out, in another connection seepage troubles in general must be expected, and if the lands of the district in their entirety are not behind the debts of the district for assessment, reassessment and, if need be, sale, the creditor must, if he be wise, ascertain at his peril and in advance, what lands the directors are going to declare irrigable, the worth of all tracts, what the possibilities of seepage troubles are, and what the people, in the absence of responsibility by the district as an entirety, will do to afford drainage to the threatened areas.

Such clearly is a burden that the creditor can not carry successfully and will not willingly assume, for under such a law he must undertake a joint risk with the district landowners without having any share in the power of choice in any vital question. This would strike at the root of the present irrigation district plan.

*Where the equities are to be found in case of loss.*—It must be admitted that where the owners of district lands have suffered unforeseen hardships and losses, either through miscalculation as to the feasibility of a project or through the mismanagement or the fraud of the promoters or officers of the district, there is a resulting injustice to the morally innocent which may appear to legislatures or courts persuasive toward lessening the obligations of the district to its creditors. As between the district and the creditor, however, it would appear that the equities of the latter are morally superior under such circumstances, since it is the failure of the district to take steps necessary to guard against mischance and loss that results in the reassessment of the more valuable lands.

*Advantages to the district of unified financial responsibility.*—Moreover, while in some particular instance a plan for apportionment of the debt may relieve landowners who have made a mistake, yet to landowners as a class desiring credit and legitimate opportunity to develop their property and secure the use of water, and to the public which is universally held to be benefited by the development of irrigation, such relaxing of the law works an injustice by destroying credit. Furthermore, even in the consideration of district affairs from the narrow standpoint and irrespective of credit, harmony is more apt to be secured, especially in drainage matters, as the result of all being "in together" and interested in the success of each landowner, or at least in the preservation of the paying capacity of each tract of land in the district. If the bonded debt can be apportioned and the maximum collectible from any one tract is the amount apportioned, the mutual interest is destroyed and those who "do not think the seepage is hurting them" are apt to be slow to vote drainage. The result is likely to be delay and loss of crops and credit. The man whose land is more favorably situated may find himself by no means immune from financial loss due to the spread of the seepage difficulties or at any rate the deterioration of the locality.

Under such circumstances the creditor's position would at best be that of receiving but a percentage of the amount due him and his bonds would be depreciated, while irrigation securities as a class would thus be adversely affected.

*A word on cooperation.*—Such community of interest among irrigation farmers is diametrically the reverse of an injustice to the

user of water. It is rather an asset to him if properly understood. It is the principle which raises the farmers who practice irrigation to a higher level in some respects than their brothers in the humid parts of the world. Irrigation forces close cooperation in the management of the water supply and thus invites it in other affairs. This circumstance is destined to make those who irrigate the leaders in modern agricultural cooperation.

Sir William Willcocks, formerly director general of reservoir studies in Egypt and consulting engineer to the Turkish Government in Mesopotamia, has well said:

The lessons of order and method are taught so thoroughly by irrigation that it is not to be surprised at that all the ancient civilizations of the world had their birth in the irrigated valleys of the great Old World rivers. Uncivilized men could live in woods, and partially civilized ones in desert oases, but to exist in a country needing irrigation men had to be disciplined and to be amenable to laws and regulations. When hundreds and thousands of families had at first to learn the laws of nature, then apply them, and then live in accord with one another, in order to insure the irrigation and drainage of their individual holdings, true civilization took its birth. (From *The Garden of Eden to the Crossing of the Jordan*, printed by the French Institute of Oriental Archaeology.)

*Two instruments for revenue collection.*—Revenue, under the irrigation district laws, may be raised in two ways:

(a) By assessment and levy by the district or the county or both cooperating under the law in manner similar to that employed by other classes of public corporations.

(b) By the imposition of tolls and charges, for operating expenses only, collected in connection with the delivery of water to the district lands. These two means will be discussed in the following pages.

#### ASSESSMENT AND LEVY.

Much the more important of the two methods of securing revenue is that of assessment and levy. It is provided that the amounts due to bondholders or to the United States are to be collected in this manner, and in all States except Texas all moneys required for operation and maintenance may thus be collected, tolls and charges being generally an alternative means for securing the costs of running the system.

The provisions of law prescribing the statutory machinery for assessment and levy for irrigation district purposes will not be detailed in the present connection. These provisions being of much importance, they are set forth rather more fully than other portions of the irrigation district laws under the headings of the various respective States.

*The agencies for collection.*—The States differ widely as to the agencies and means for assessment and levy, some statutes providing for irrigation district officers and separate machinery for assessment and collection, while others employ in full or in part the officers and machinery of the county or counties in which the district lands are situated. The county in which the major portion of the lands lie or the office of the district is situated has in such case the central responsibility.

*Basis and measure of assessment.*—The basis for valid assessment, even where assessment is made in proportion to the value of the



land, is the fact of benefit to the market value of the land assessed. (Fallbrook Irr. Dist. v. Bradley, 164 U. S., 112.)

The measure of the amount of assessment differs widely among the irrigation-district States. Under the California, Nebraska, and Oklahoma laws assessments are proportioned to the value of the real property of the district less the value of the improvements placed thereon.

In Texas the assessments are made in accordance with the valuation of all property, real and personal, within the district.

The Utah criterion is the value per acre-foot of water allotted by the State engineer to district lands which may vary in different units of the same district.

In Arizona, Colorado, Montana, New Mexico, Oregon, and Wyoming provision is made either that the irrigable lands shall be assessed at the same rate per acre or that the lands for purposes of assessment shall be valued at the same rate per acre.

Assessments in Idaho, Nevada, North and South Dakota, and Washington are made in accordance with the benefit derived by the respective lands to be taxed.

Of the various measures of assessment, it is believed that the benefit test is preferable. There are in some localities inferior lands, which nevertheless can be irrigated for pasturage or otherwise, which can not stand the same flat rate of charge as the ordinary lands of the district. These lands, however, for pasturage, it may be, can help sustain the burden of the construction of works, and their irrigation may be an economic gain, or even render feasible a questionable undertaking. There are, moreover, in many localities to be irrigated lands which at the formation of an irrigation district have a prior right, supplying water for only a portion of an irrigation season. Such lands should be compellable to be brought within the boundaries of the district and should be taxable for a supplementary water supply, being benefited by the increase of the period of productiveness and the crops which may be secured. The bringing of these lands into the district is best and most equitably accomplished under a benefit method of assessment whereby they would be charged only for the supplemental supply.

Moreover, necessary drainage works may in general best be secured, and the landowners are, we believe, most apt to cooperate in drainage work under a law which provides for assessment in proportion to benefits obtained rather than under the flat rate or ad valorem principle.<sup>1</sup>

*Assessment laws valid—Ad valorem method.*—Assessment in accordance with the value of the lands was early attacked under the California act. It was sustained by the supreme court of that State in the case of *In re Madera Irr. Dist. Bonds* (28 Pac., 272; 92 Calif., 296).

The same method was also fully upheld by the Federal Supreme Court in the case of *Fallbrook Irr. Dist. v. Bradley*. Therein the court found that it was "plain that the fact of the amount of benefits is not susceptible of that accurate demonstration which pertains to demonstration in geometry. Some means of arriving at this amount

<sup>1</sup>In this connection the foregoing discussion of drainage by irrigation districts (p. 26) should be noted.



must be used, and the same method may be more or less accurate in different cases involving different facts." The conclusion arrived at was that the ad valorem method was clearly no violation of the Federal Constitution, but rather a matter of detail "open to the discretion of the State legislature, and with which this court ought to have nothing to do." The court admits that "the way of arriving at the amount (of assessment) may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from the case of taking property without due process of law." (164 U. S., 112, 176, 177.)

The Nebraska law for assessment in proportion to realty values, exclusive of improvements, has several times been declared constitutional by the supreme court of that State. (See Board of Alfalfa Irr. Dist. v. Collins, 64 N. W., 1986; 46 Nebr., 411.)

*Assessment of personal property upheld in Texas.*—The Texas statute for assessment according to the value of all personal as well as real property in the district has been held constitutional by the supreme court of that State. A constitutional amendment, referred to under the special discussion of the Texas law, authorizes conservation districts, including levee and irrigation districts, to assume indebtedness above the former limit of district liability. The decision was made in the case of a levee district, under a law which, like the irrigation act, requires both realty and personalty to be assessed ad valorem, and is clearly applicable to irrigation and other types of districts when brought under the conservation district act. The latter act prescribes equitable assessment, leaving the method to the irrigation district and other public corporation laws.

The court held as follows:

It is clear that the conservation amendment does not undertake to prescribe any given rule for making the apportionment. \* \* \*

It can not be said as a matter of law that a rule which apportions taxes of this character according to the value of the property affected is one plainly arbitrary and unfair. It is a veteran rule for the apportionment of property taxes, sanctioned by immemorial usage and universally applied. It is the one most familiar to the people. Its general justice is not open to challenge. It is an approved method for the apportionment of taxes of this kind. Its adoption was a matter of legislative discretion.

That the Canales Act permits the taxation of other than real property within a levee district for the purpose of the improvement presents no constitutional objection. It can not be said that personal property situated within such a district does not derive a certain benefit from the improvement. It, with real property, is equally subject to damage from overflow, and with perfect justice may be taxed for such an improvement. (Dallas County Levee District v. Looney, Dec. 18, 1918, unreported when this material was completed.)

*Flat rate and benefit assessment held valid.*—Constitutionality of assessment upon a flat rate basis or a statutory requirement that the assessor value all district lands equally has seldom been construed by the courts.

A law requiring assessment of all lands equally was held constitutional by the Utah Supreme Court in Lundberg v. Green River Irr. Dist. (119 Pac., 1039).<sup>1</sup>

The benefit criterion for assessment has been often declared constitutional in all forms of public corporations created for local improvement for public purposes. Irrigation district cases are Pioneer

<sup>1</sup> The decision related to the law of 1909 (ch. 74, sec. 19) rather than the present Utah act which, as above stated, prescribes a different rule of assessment.

*v. Bradbury* (68 Pac., 295, 301; 8 Idaho, 310); *Oregon Short Line R. R. v. Pioneer Irr. Dist.* (102 Pac., 904; 16 Idaho, 578); *Cannon v. Hood River Irr. Dist.* (154 Pac., 397; 79 Oreg. (1916), 71).

*Relaxation from liability of district as a whole.*—Turning now to modifications of the rule that the lands of the district shall be and remain liable for the debts of the district, discussion of which in detail was postponed from the opening paragraphs upon revenue, reference is made to certain provisions of the Montana law of 1917.

*Same—Defect in Montana act.*—The paragraph in the Montana law which outlines the lien which shall form the security behind the bonds of the district or behind the contract with the United States, as the case may be, contains the provision that in the resolution providing for the issuance of bonds and in the proceedings for confirmation thereof, the amounts to be paid to the purchasers of bonds or to the United States, shall "be apportioned on each 40-acre tract of land and every separately owned subdivision thereof, within said district, by dividing the total of the principal of said indebtedness by the number of acres of land within the district actually irrigable from its system and works, \* \* \*." Moreover, every acre of land must be assessed for its equal proportion of the debt and the interest, and any owner at the time of payment of his annual taxes may pay to the county treasurer the total sums assessed against his lands with interest to the end of the current year.

If he so pays his land shall be discharged from the lien of the bonds and for further assessments for interest thereon, remaining of course liable for annual maintenance assessments; and the moneys so paid are placed in a sinking fund. (Mont. L. 1917, p. 333.)

There are also provisions for the distribution of the lien of the debt, and for the making of a certificate showing the area actually irrigable from the works, and requiring that the levy of the tax and special assessment, or the resolution for the spreading of the assessment, shall specifically schedule the apportionment of the lien for the bond issue on each 40-acre tract. Similar provisions for apportionment are made applicable to equalization proceedings and to the confirmation of the bonds. (L. 1917, p. 335.)

Modification of the law to such effect could not constitutionally be made effective to release lands from the obligation to discharge bonds outstanding when the act was passed. Hence the Montana law provides for proceedings by the district to avail itself of the benefits of the act, the filing of written consent of all bondholders being expressly a prerequisite thereto.

But as to all bonds to be issued subsequently the clear effect of the foregoing provisions of law is that the creditors of the district, including the United States, may be limited in their recourse to each individual tract as a separate element of security. The district as a corporate entity would undertake no entire obligation but acts in effect as the collecting agency for the bondholders of the United States, the individual tracts becoming in severalty the security.

To reiterate, this strikes at the heart of the irrigation district idea in that the creditor, in order to be safe, must investigate every acre of land and assure himself that all the lands deemed to be irrigable are so in fact and are actually worth the apportioned amount of the debt. The bondholders under this law would become their own

insurers against the contingency that there are lands of the district which may become damaged by seepage and alkali; for under the law the other landowners will lack the customary interest in seeing that proper drainage facilities are constructed and made effective.

*Same—Arizona provision for discharge of obligation.*—Arizona apportionment provisions prescribe that upon full payment on behalf of any tract the treasurer shall issue a certificate to such effect which shall operate as a release "except in the event of a default of a district in payment of such bonds at maturity, taxes may then be levied on such tract or tracts of land to meet such deficiency, provided, however, should property so released be taxed to pay such deficiency it shall be entitled to all benefits accruing from the purchase of lands sold at tax sales." (Ariz. L., 1915, 2d spcl sess., p. 83.)

This is an improvement upon the Montana provision, but gives no assurance as regards the full payment to the bondholders of interest prior to maturity.

*Same—Release from debt for refunding bonds—Colorado.*—The Colorado law for refunding bond issues provides for the ascertainment by the assessor of the proportionate liability of any tract of land by dividing the amount of the refunding bonds by the acreage of the district and multiplying the quotient by the acreage of the landowner applying for relief. Upon the assessor's certificate as to the same to the treasurer, the landowner secures relief from taxation by tendering to the treasurer refunding bonds, the principal of which equals the amount found as his share of the debt. (Colo. L., 1917, ch. 85, p. 318.)

*Same—Dakota provisions.*—The provisions in North and South Dakota for relief of lands "subirrigated to the extent that water is no longer of any benefit thereon for irrigation purposes," from assessment until drainage is supplied, is too lenient. Subirrigation often obviates the necessity for irrigation without injuring greatly the crop-producing powers of the district. In such cases, too, the water supply used to produce the crops comes from the irrigation system. This provision tends to lessen the security of the bondholders and decrease the common interest in drainage measures. (N. Dak. L., 1917, p. 131; S. Dak. L., 1917, p. 550.)

*Duty to reassess lands upheld on appeal.*—The question of whether lands are to be free from further assessment for the failure of other district lands to furnish the assessments levied upon the latter, or whether such lands are exempt when the regular proportionate amount required under just and legal assessment proceedings has been paid for them, was directly raised in a case arising in United States District Court for Colorado.

The district court, basing its view upon the distinction between ordinary taxation and the assessment by the district for the local improvement purpose of irrigation, denied the power of the district officials to assess lands for the failure of other lands to produce the amount of the assessments. The court held as follows:

In view of the foregoing I am of the opinion that the annual levies required by the Colorado act are not to be regarded in the light of levies for general taxes, and must be considered as assessments to pay for local improvements, and that the total burden thus placed upon each acre must be reasonably proportionate to the benefits received. The owners can not be taxed disproportionately to each other. (Authority cited.) Such assessments are only sustainable when the benefits received by the property assessed are proportionate

to the burden placed upon it. (Authority cited.) (Norris v. Montezuma Valley Irr. Dist., 240 Fed. Rep., 825, 828.)

This case, however, was reversed by the Circuit Court of Appeals, Eighth Circuit. To quote from the majority opinion delivered by Mr. Justice Munger:

The scheme disclosed by these statutes relating to irrigation districts looks to uniformity of assessment per acre for the payment of the district's indebtedness, but they also provide that the "bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided"; also, the county boards are "to fix the rate necessary to provide the amount of money required to pay the interest and principal of the bonds of said district as the same shall become due." \* \* \*

The defendants in error press the claim that a reassessment violates the statutory scheme of uniformity of taxation on each acre of these lands. \* \* \* The legislature is presumed to have knowledge of the fact that under any system of taxation by assessment hitherto devised a portion of the taxpayers neglect to pay the taxes levied against their property for a long period after they become due. \* \* \* It is a common provision in the State constitutions and statutes that assessments or levies for taxation shall be uniform upon the same class of subjects, or by value. Such provisions are not violated when, after the lapse of a reasonable time, and after reasonable efforts have been made to collect the first levy, an additional levy is made upon all the property in the district because of the failure of some of the taxpayers to pay their portions of the first levy. (Norris v. Montezuma Valley Irr. Dist., 248 Fed. Rep., 369, 372, 373, 374.)

The court held the bondholders entitled to writ of mandamus to compel levy of assessment to meet the deficiency in payments to them.

*Apportionment of assessment annually or once for all.*—Most of the State laws provide for annually recurring assessment of district lands. This might be deemed necessary in the case of ad valorem assessment, although even the Texas ad valorem law provides that the tax as originally levied shall remain in force from year to year until a new levy shall be made. The Idaho law, however, providing for assessment upon the benefit principle, prescribes that after the benefits anticipated from any bond issue are ascertained and equalized, the amount so apportioned or distributed to each tract shall be and remain the basis for fixing all future annual assessments. After confirmation of the assessment and apportionment, no change in the apportionment can be made, but annual levy is made in the same proportion. This is true of any extra levy which might be necessary to meet delinquencies under the coexisting provision that all district lands shall be and remain liable to be assessed for the district indebtedness.

*Idaho plan discussed.*—This plan has obvious advantages. It avoids annual expense, anxiety, and opportunity for controversy. There is, however, a possibility of injustice, since it is not always practicable to ascertain at so early a period in the life of the district, particularly in view of possible seepage depreciation, how the final apportionment in justice should be made. It is probable that the decree in confirmation of assessment and apportionment should be made expressly susceptible of being reopened by the court after a set period of years upon showing of manifest injustice, whereupon a supplemental and possibly final readjustment of the assessment might be made in order to accord with experience. If so amended it is believed that the Idaho assessment law would be the best yet devised. This law is not objectionable in its method of apportion-

ment of assessment upon the score of any release of lands or partial release of the debt.

Nevada followed Idaho in the matter of assessment in the 1917 amendatory act.

*What lands assessable.*—The fundamental power to levy assessments, whether assessment be under the ad valorem, the flat rate per acre, or the benefit basis, rests upon the benefit derived from the lands to be taxed. (Fallbrook Irr. Dist. v. Bradley, 164 U. S., 112; Knowles v. New Sweden Irr. Dist., 101 Pac., 81; 16 Idaho, 217.) But it does not follow by any means that this benefit rests solely upon the irrigation of the land. The enhancement of the market value of city and town property, which admittedly never will be irrigated, justifies taxation, and that, too, ad valorem, for irrigation district purposes. Lands which can be used without irrigation, but which will be improved thereby, have been held assessable in several cases. (See In re Madera Irr. Dist., 28 Pac., 272; 92 Calif., 296; Tyson v. Washington Co., 110 N. W., 634; 78 Nebr., 211; Fallbrook Irr. Dist. v. Bradley, supra.)

Public lands of the United States both entered and unentered are assessable in the manner and to the extent prescribed by the Smith Act, which is discussed above (p. 24).

The assessment of railroad lands has also been upheld. (See Short Line v. Pioneer Irr. Dist., 102 Pac., 904; 16 Idaho, 578.)

*Assessment of State lands.*—The nearest approach to uniformity in the matter of provision for the inclusion and assessment by a district of State lands lying within its boundaries is to be found in the utter failure of many of the States to legislate on the subject. Wherever the attempt has been made to cover this field, each State seems to have dealt with the matter from a different angle. The State legislatures should provide as adequate cooperation with districts as regards State lands as Congress has provided as regards the Federal public domain. (See supra, p. 24.)

Perhaps the most unusual provision is that of South Dakota, which specifies that common school and endowment lands of the State within an irrigation district shall be sold within five years from the date water is available for irrigation, and after the sale these lands may be brought into the district in the same manner as other lands may be included.

*Same—Leasehold interests.*—It is quite commonly provided that leasehold interests in State lands within a project shall be subject to assessment and taxation as other real property in the district. The holders of the leasehold interest are required to pay the assessments, and in return are given a voice in the affairs of the district.

*Same—Payment of assessments by the State.*—The payment of district taxes by the State is an unusual feature, but express provision for this has been made by two States.

Colorado in 1909 (M. A. S., 1912, secs. 4019-4023) made agricultural college and school lands of the State subject to inclusion within a district upon petition of the State board by land commissioners. Such land would then become liable to assessment for district purposes, the same to be paid by warrant issued by the State treasurer. The amounts so paid were to be charged to the respective tracts of land involved and repaid to the State by the purchasers when the lands were sold.

This law appears, however, to have been modified by the act of June 2, 1911 (M. A. S., 1912, secs. 5846, 5847), which, without expressly repealing the former act, provides in somewhat more general terms that the board of land commissioners may contract for water rights for State land with irrigation districts or private parties, or may petition for inclusion of such land within irrigation districts. But "in no case shall any interest or title of the State be made liable or subjected to any claim for any water tax, water assessment, or water charge by reason of the inclusion of any such State lands in any irrigation district." Provision is also made in the latter law that "all assessments or other payments for the cost of so irrigating any State lands shall be paid by the lessees or purchasers thereof."

Nevada also appears to have superseded a former law permitting State lands to be sold for irrigation district taxes by one which prohibits the assessment of State lands for district purposes. Under the present method State officials ascertain the amount of benefit which will accrue to State lands by reason of any irrigation district project. Contract may then be made with the district whereby the State pays the value of such benefits in cash, such payments to be charged to the land and later repaid to the State by the purchasers of the respective tracts. (See *infra*, p. 130.)

*Same—Payment of assessments by purchaser or lessee.*—A more conservative doctrine is to permit the State lands to be assessed as other lands in the district for district purposes, all such assessments to be paid by the purchaser or lessee of the tract assessed when contract for sale shall be made. This is the Oregon method, as well as that of California, the latter State having what is perhaps the most satisfactory provisions on the subject. In a special act (L., 1917, p. 936) State lands within irrigation districts are made "subject to all the provisions of the law relating to the organization, government, and regulation of irrigation districts to the same extent and in the same manner" as private lands, with the proviso that the State will not be responsible for the payment of any charges or assessments. No State lands in California may be sold for assessments levied while they were unentered, but such assessment remains a lien upon the land and must be paid before patent will be issued therefor by the State.

*When validity of assessment of lands may be raised.*—In a recent case before the Supreme Court of the United States writ of error had been sued out from a decree granted by an Idaho district court, affirmed upon appeal by the State supreme court, in confirmation of a contract pending with the United States under the reclamation act. The ground for the writ was that lands of the plaintiffs in error, cross-complainants in the State court, would be assessed to meet the contract debt without benefit, since they were possessed of a sufficient water right.

The Federal Supreme Court, however, held that the issues stated in the cross complaint were prematurely raised, for by the confirmation of the contract the plaintiffs in error would not be deprived of their property without due process of law. The court found that such issues could be timely raised only upon the subsequent assessment proceedings, saying:

This for the reason that the State statute provides that any assessments upon such lands to carry into effect the purposes of the contract must subsequently



be made by the board of directors of the irrigation district on the basis of benefits conferred, at a meeting of the board, to be held at a time and place of which the owners of the lands to be charged must be notified by postal card and by newspaper publication. (Idaho Rev. Codes, vol. 1, title 13, ch. 4, art. 2400.) At such meeting the landowner may object to any proposed assessment on his land, and if the objection is overruled by the board, and he does not consent to the assessment as finally determined, such objection shall, without further proceeding, be regarded as appealed to the district court, and shall there again be heard in proceedings to confirm the assessment. It is explicitly provided that upon such hearing the court shall disregard every error, irregularity, or omission which does not affect the substantial rights of any party and shall correct any error which may be found in such assessment, or any injustice which may result from it. (*Petrie v. Nampa and Meridian Irr. Dist.*, decided Dec. 9, 1918, 248 U. S., 154.)

*Discretion of the board in assessing.*—The officers charged with the duty of making the assessments have broad powers of discretion. In case they follow the principles of assessment laid down for their guidance by the statute, "no claim being made of any fraud, the determination of the board must be accepted as conclusive." (*Colburn v. Wilson et al.*, *Directors of Emmett Irr. Dist.*, 132 Pac., 579, 582; 24 Ida., 102.)

Courts will seldom review assessments made by boards authorized to assess for public corporations. The California Supreme Court has laid the rule down as follows:

The board of directors must be allowed to exercise a discretion in determining how great an assessment will be "sufficient to raise" the annual interest; and, unless it can be seen that they have abused this discretion, courts ought not to interfere with their action. If, however, the disparity between the amount of the assessment and the amount of the annual interest is so great as to make it appear that their action was improper, and not in the exercise of any discretion, so that the assessment is excessive, courts are authorized to prevent its enforcement. Although the levying of an assessment is an act of a legislative character, yet the board of directors is not clothed with the supremacy of the legislature in this respect, but is in the exercise of a delegated power, and subject to control by the judiciary if it steps beyond the limits of the power conferred upon it. (*Hughson v. Crane*, 47 Pac., 120, 123; 115 Calif., 404.)

*Mandamus for failure to assess.*—A writ of mandamus will issue to compel the district board or the county board, as the case may be, to make the assessment necessary for revenue to pay the debts of the district. (*Board of Supervisors of Riverside Co.*, *California v. Thompson*, 122 Fed. (C. C. A.) 860; *Henrylyn Irr. Dist. v. Thomas*, 173 Pac. (Colo., 1918), 541; *Nevada National Bank of San Francisco v. Board of Supervisors of Kern Co.*, 91 Pac., 122; 5 Calif. App., 638; *State ex rel Witherop v. Brown*, 53 Pac., 548; 19 Wash., 383.)

The Colorado Supreme Court has held that where an irrigation district is in default in payment upon warrants the warrant holder can not sue to recover a money judgment, the exclusive remedy being mandamus. (*Rio Grande Junction Ry. Co. v. Orchard Mesa Irr. Dist.*, 171 Pac. (1918), 367.) Mandamus has also been held by the same court to be the exclusive remedy in case of default upon bonds. (*Henrylyn Irr. Dist. v. Thomas*, 173 Pac. (1918), 541.)

*Defective assessment.*—The courts are strongly inclined to support assessments made in good faith and to hold defects immaterial. For numerous defects susceptible of being waived the irrigation district case of *Corson v. Crocker* (161 Pac., 287, Calif., 1916) may be consulted.



In another California case it was held that although no curative act can deprive a landowner of his property or of his right to resist a pretended sale, or take property without due process of law, yet unless the landowner sues within the period prescribed for attacks upon an assessment he is precluded from resisting the enforcement of an assessment on the ground of noncompliance with any provisions of law which the legislature need not have laid down in order to make the law constitutional. (*Imperial Land Co. v. Imperial Irr. Dist.*, 161 Pac., 113; 173 Calif. (1916), 660.)

Moreover, the principles of estoppel apply in the matter of the avoidance of an assessment or a tax sale. If the landowner fail to act with promptness in case of defects and irregularities, he will be deemed to have waived his right to object. (Page v. Oneida Irr. Dist., 141 Pac., 238; 26 Idaho (1914), 108.)

It is nevertheless exceedingly important that public officials charged with the duty of assessment, levy, and foreclosure take every precaution to follow the statute precisely in these functions. Courts do not always agree as to which of the steps prescribed by law are vital and jurisdictional. The responsibility upon the officers is not only to avoid fundamental omissions which would nullify an assessment, but also to avoid errors which invite litigation. Then, too, there is the question of titles to be considered in all cases in which tax foreclosure follows default in the payment of the assessment.

*Nature of irrigation district lien.*—The statutes, in declaring that the lands of the district shall be and remain liable to be assessed for district purposes, and in supplementing such declaration, as a few of them do, with the proviso that the bonds shall become a lien upon all the water rights, the irrigation system, and other property owned or acquired by any irrigation district, and that the creditor upon default of the district may take possession of the district property and control the same until such lien can be enforced in a civil action (see Wash. Remington Statutes, sec. 6432), do not create a lien upon the property of any landowner.

Upon the contrary it is only in connection with the annual levy of assessment, and upon a statutory date that the amount of the assessment becomes a lien upon the lands of individual owners.

This is clear from the following cases: *Boskowitz v. Thompson, Collector for Tipton Irr. Dist.* (78 Pac., 290; 144 Calif., 724); *Merchants' Bank v. Escondido Irr. Dist.* (77 Pac., 937; 144 Calif., 329); *Thomas v. Patterson, Co. Treasurer* (159 Pac., 34; 61 Colo. (1916), 547); *Condit v. Johnson* (139 N. W., 477; 158 Iowa (1913), 209).

*Relation of irrigation district liens to titles.*—This distinction while obvious is often overlooked. It is important in the ordinary cases of the transfer of title as in the Iowa case last above referred to which held in construing a Colorado statute, that the existence of an irrigation district bond issue effects no specific lien upon the land nor obligates a vendor to pay in advance of assessment in order to convey title free of incumbrance.

But the distinction is more important in the case of mortgage companies restrained by by-laws or fiduciaries restrained by statute from loaning except where mortgage prior to all other liens and incumbrances is secured.

It is sometimes difficult for laymen to understand that the alteration of security from a private mortgage to a bond issue or a contract

with an irrigation district, although the debt remain undiminished, will so operate as to remove the statutory bar to loans.

The irrigation district bonds, however, are of the same legal character as school district or county bonds and in no sense constitute liens or mortgages on private lands. The annual assessments of irrigation districts, however, just as similar assessments of other public corporations, become liens annually.

*Situation under Federal farm loan act.*—The Federal Farm Loan Board early encountered the problem of loaning under the Federal farm loan act (39 Stat., 360), which forbade approval of loans not secured by first mortgage. The question was acute in the irrigated portion of the country where mortgage liens for payment of water charges or to secure bonded indebtedness or recoupment of water companies affecting millions of acres made loaning impossible under the Federal farm loan act.

*Reclamation Service liens.*—A difficult phase of the question resulted from the fact that the Federal Reclamation Service had liens embodied in "water-right applications" to the United States and other liens inuring to the benefit of the Government in each "stock subscription and contract" given by the landowners to the water users' associations cooperating with the United States.<sup>1</sup>

Congressional committees considered as alternative plans the amendment of the reclamation act so as to waive the priority of the lien of the United States for the irrigation costs and the amendment of the Federal farm loan act so as to permit the acceptance of a mortgage subordinate to that of the United States for the irrigation costs, but were unwilling to adopt either alternative.

*Legal bar removed in case of irrigation district.*—The result is that irrigation mortgage liens, whether to the United States or to private persons or corporations, remain a legal bar to Federal loans. But where the costs are secured by irrigation district bonds or contract with the United States and there are no mortgage liens of record therefor the Federal Farm Loan Board is able to approve loans, and is doing so both on Government reclamation projects and elsewhere, provided always that the security is satisfactory in view of all the circumstances. Where, however, there is a lien reserved in the patent no relief is yet legalized. (See *supra*, p. 25.)<sup>2</sup> The debts of irrigation districts, of course, must be taken into consideration as affecting the amount of the loan which under the law may be approved, but the legal bar does not exist where the irrigation district method as contrasted with the private mortgage method is employed.

The result has been that irrigation districts have been formed partly to relieve the lands incorporated therein from the private liens and at times to discharge the liens in favor of the United States and the water users' associations, and thus to obtain the benefit of the Federal farm loan act. This has been one of the inducing but not the principal or moving causes of the reorganization of irrigation districts of the projects mentioned on an earlier page.

<sup>1</sup>A discussion of this matter will be found in the statement of Will R. King in certain congressional hearings. (See Joint Hearings Before the Subcommittees of the Committees on Banking and Currency Charged with the Investigation of Rural Credits, 63d Cong., 2d sess., 1914, pp. 940-947.)

<sup>2</sup>This lien is sought to be removed by H. R. 2702, introduced by Congressman Raker, under consideration before the Arid Lands Committee at time of going to press.

*Further revenue procedure.*—The statutes provide for a greater or less degree of identification of the collection methods with the county revenue procedure, some prescribing equalization by the district board and others in the same manner as ordinary taxes are equalized. The levy is made in a majority of the States by the county officers; in California and several others by the district officers. Foreclosure and sale generally conform to the ordinary case of lands delinquent in the payments of county taxes, a different period of redemption, however, being prescribed in some States. These matters will be found outlined to some extent under the heads of the various States, but by no means as a substitute for consultation of the statutes.

The laws in general provide for various funds into which the moneys obtained as a result of the revenue proceedings are to be covered for the various district purposes. Almost all States provide separately for a bond fund and a maintenance or current expense fund; others provide a separate fund for moneys to be paid to the United States under contract therewith.

The distinction between the funds resulting from their diverse purposes and functions is important for the district officers to bear in mind.

The Colorado Supreme Court, in the case of *Eberhart v. Canon, Country Treasurer* (157 Pac., 189), has held with reference to the respective funds that "each is for a specific purpose and should be used for that purpose, and no other, until the purposes for which it was raised have been satisfied" (p. 191).

Not only so, but the court held that the moneys derived from the levy for one year for maintenance, operating and current expenses could not be used for the payment of the same class of expenses for some prior year until all of those for the year for which it had been levied were paid. This is for the reason that if the district becomes involved it might well be "that all the moneys levied and collected would be used in the payment of the warrants of prior years and be totally insufficient for that purpose, thereby leaving the district without any funds to meet the current obligations or with which to in any manner continue its existence, etc." (Id., p. 191). See also the case of *Rio Grande Junction Ry. Co. v. Orchard Mesa Irr. Dist.* (171 Pac. (Colo., 1918), 367).

*Special assessments.*—Some of the laws provide that where the proceeds of bond sales are insufficient for carrying out the construction plans adopted by the district, and additional bonds are not voted, the board shall by special assessments provide for the completion of the works. In some States this is dependent on a popular vote; in others it is mandatory upon the board and an election is not held.

Special assessments when levied for such purpose or any other purpose authorized by law are in general collectible in the same manner as other assessments made and levied by the districts. (*Holland v. Avondale Irr. Dist.*, 166 Pac., 259; 30 Ida., 479.)

#### TOLLS AND CHARGES.

The second method whereby irrigation districts are authorized to secure revenue is by the imposition of tolls and charges. This

method is analogous to the method whereby a city obtains its revenue for water service, it being discretionary with the corporation to stop the service when the consumer fails to make current payment for current usage.

Tolls and charges are by most statutes merely an alternative means for securing revenue, and then only for the operation and maintenance costs. In Texas, however, as will be noted from a reference to the résumé of the law of that State (*infra.*, p. 150), provision is made that a portion of operation costs must each year be collected by tolls and charges, the balance being secured by assessment and levy. The statute provides in some detail the time and method of securing the charges, and as to the security to be obtained in case forbearance is exercised in the matter of prompt payment.

This method of securing funds required for operation, maintenance, and current expense is very effective as regards lands under cultivation and equally ineffective as regards lands not under cultivation.

#### CONSTITUTIONALITY OF THE IRRIGATION DISTRICT LAW.

The constitutionality of several portions of the irrigation district laws has already been treated. It remains to refer briefly to the constitutionality of the general principles of these laws.

The unanimous opinion of courts of last resort has been to uphold the irrigation district acts of all of the States in all leading provisions and in their general scope. There have been occasional features of several of the irrigation district acts which have been held not to accord with State constitutions. An example is found in the original provisions for the electorate of Idaho irrigation districts referred to above (p. 19). But as heretofore pointed out has not thus far been followed by any of highest courts of other States.

As in many other irrigation district matters the place of pioneer, in the judicial construction of the irrigation district law, has been taken by the State of California. Probably the leading decisions upholding the constitutionality of these acts are *Modeso Irr. Dist. v. Tregoe* (26 Pac., 237; 88 Calif., 334); and *in re Madera Irr. Dist.* (28 Pac., 272; 92 Calif., 296).

The case of *Bradley v. Fallbrook Irr. Dist.*, however, arising in the same State, elicited a very different opinion from the United States Circuit Court for the Southern District of California, Mr. Justice Ross holding that the creation of irrigation districts could not be sustained under the power to make assessments for local improvements, and that it was clear the statute provided for the taking of private property without due process of law. The court concluded as follows:

Unfortunate as it will be if losses result to investors, and desirable as it undoubtedly is, in this section of the country, that irrigation facilities be improved and extended, it is far more important that the provisions of that great charter, which is the sheet anchor of safety, be in all things observed and enforced. (*Bradley v. Fallbrook Irr. Dist.*, 68 Fed., 948, 966.)

This case, however, was appealed to the Supreme Court of the United States and the constitutionality of the irrigation district law of California was fully upheld. Among the points favorably decided were that irrigation of arid lands is a public purpose, and

the water so employed is put to a public use; that the statutes providing for irrigation are valid exercises of legislative power; that due process of law is provided and equal protection of the law is given in the irrigation district proceedings where the revenue provisions are those customarily followed in the State and the landowner to be charged has an opportunity to be heard; and that the act makes proper provision respectively for hearing upon the formation of a district, upon the determination of the boundaries thereof, upon confirmation of the compliance with the act, and upon apportionment of the benefits to be derived by the lands to be taxed. The plan of assessment was also declared valid.

In this case the Supreme Court upheld the act in view of both the Federal and State constitutions, as regards the former after an original inquiry, and in the case of the State constitution, being bound by the construction adopted by the California Supreme Court.

Many features of the irrigation district laws are found to be within the provisions of the State constitutions in view of the distinction to be made between ordinary taxation and the making and levying of special assessments for local public improvement purposes. Irrigation district revenues are held to be for the latter function of public corporations as contrasted with taxation for purely governmental purposes.

This distinction is familiar in the law of public corporations and has been established for a long period. It was recognized in 1892 as regards the irrigation district law in the Washington case of *Board of Middle Kittitas Irr. Dist. v. Peterson* (29 Pac., 995, 997; 4 Wash., 147). The leading California case upon this point is *San Diego v. Linda Vista Irr. Dist.* (41 Pac., 291; 108 Calif., 189). The court in this case held as follows:

The district, when formed, is a local organization, to secure a local benefit, to be derived from the irrigation of lands from the same source of water supply, and by the same system of works. It is, therefore, a charge upon lands benefited, or capable of being benefited, by a single local work or improvement, and from which the State, or the public at large, derives no direct benefit, but only that reflex benefit which all local improvements confer. In *Taylor v. Palmer* (31 Cal., 241, 255), the court defined the term "assessment," as distinguished from "taxation," thus: "It is not a power to tax all the property within the corporation for general purposes, but the power to tax specific property for a specific purpose. It is not a power to tax property generally, founded upon the benefits supposed to be derived from the organization of a government for the protection of life, liberty, and property, but a power to tax specific property founded upon the benefits supposed to be derived by the property itself from the expenditure of the tax in its immediate vicinity" (p. 292).

It is only in view of the foregoing distinction that irrigation district statutes are held constitutional as not being within the purview of many constitutional provisions, among others, prohibitions against property qualification for the exercise of the voting franchise, residence requirements for voting, prohibitions against inequality of taxation, prohibitions against municipal corporations incurring liabilities above a certain percentage of the valuation of the land therein, prohibitions against taxation upon any other theory than *ad valorem* valuation, and many others that need not be catalogued.

The Supreme Court of the United States has recognized the local improvement status of the irrigation district and the special assessment character of the revenue machinery in the case of *Fallbrook*

Irr. Dist. *v.* Bradley (*supra*, pp. 161, 163, 174, and 176). Moreover, the cases of Lundberg *v.* Green River Irr. Dist. (119 Pac. (Utah), 1039), and McCord Mercantile Co. *v.* McIntyre (138 Pac. (Colo. 1914), 59), may also be consulted in this connection.

The constitutionality of the irrigation district laws have, however, been so thoroughly and so universally established that the subject need not be elaborated. Among State decisions upholding the constitutionality of the act the following may be cited: Anderson *v.* Grand Valley Irr. Dist. (85 Pac., 313; 35 Colo., 525); Nampa & Meridian Irr. Dist. *v.* Brose (83 Pac., 499; 11 Ida., 474); Knowles *v.* New Sweden Irr. Dist. (101 Pac., 81; 16 Ida., 217); O'Neill *v.* Yellowstone Irr. Dist. (121 Pac., 285; 44 Mont., 492); Board of Directors of Alfalfa Irr. Dist. *v.* Collins (64 N. W., 1086; 46 Nebr., 411); Baltes *v.* Farmers' Irr. Dist. (83 N. W., 83; 60 Nebr., 310); Little Walla Walla Irr. Dist. *v.* Preston (78 Pac., 982; 46 Oreg., 5); Hall *v.* Hood River Irr. Dist. (110 Pac., 405; 57 Oreg., 79); Lundberg *v.* Green River Irr. Dist. (119 Pac. (Utah), 1039); Board of Directors Middle Kittitas Irr. Dist. *v.* Peterson (29 Pac., 995; 4 Wash., 147); Kinkade *v.* Witherop (69 Pac., 399; 29 Wash., 10).

Among more recent California cases are *In re bonds of South San Joaquin Irr. Dist.* (119 Pac., 198); Bliss *v.* Hamilton (152 Pac., 303). The California provision for the recall of irrigation district officers is held valid in Wigley *v.* South San Joaquin Irr. Dist. (159 Pac., 985).

#### IRRIGATION DISTRICTS IN OPERATION.

The financial and judicial engineering and construction methods provided by law as above outlined are obviously merely interrelated means to an end. The ultimate and, as human affairs go, permanent goal is a soundly financed, legally constituted and properly built irrigation system operating as a district. Some of the functions of organized districts already have been outlined. (See powers of the district board, *supra*, p. 20; drainage, *supra*, p. 26; relations with the Federal Government, *supra*, p. 21; revenue, *supra*, p. 52.)

*Water right.*—It is not appropriate in the present work to undertake a discussion of the methods to be followed by irrigation districts in the fundamental matter of the securing of a water supply, since this is accomplished solely through such laws of each State as govern the appropriation of water, the perfection of usufructory rights therein and the adjudication thereof as between rival appropriators. These provisions are of general application to water claimants however organized and therefore belong to general irrigation law. Nebraska districts are expressly authorized to secure a water supply from neighboring States (*infra*, p. 125).

*Vested rights.*—As expressly prohibitive of any possible interpretation that these public corporations are granted special privileges in water, many of the statutes, particularly the earlier enactments, make provision that neither navigation nor vested interests in mining water rights or other mining property shall ever be impaired, except that rights of way may be acquired over mining property. It is also specified that the irrigation act shall not be interpreted to authorize the diversion of water, from natural or artificial courses, to the detriment of any irrigation or other interests.



*Districts can not adjudicate water rights.*—Not only does the jurisdiction of an irrigation district fall short of any power to invade the property of persons having rights in land outside of the confines of the corporation, but prior rights of owners within the district are beyond the jurisdiction of the district as an arbiter.

In the Oregon case of *Little Walla Walla Irr. Dist. v. Preston* (78 Pac., 982; 46 Ore., 5), the board had assumed jurisdiction to decide upon the priorities of owners having earlier rights to the use of water owning lands within the confines of the district. The court held that the irrigation district law does not vest the board "with supervision or control over the rights of individuals."

Questions as to the use of waste water, the relations between "old" or prior water rights and "new" rights acquired through the corporation, and the duration of water rental rights are all decided as regards irrigation districts in the same manner as for water companies. (See *Gerber v. Nampa & Meridian Irr. Dist.*, 100 Pac., 80; 16 Ida., 1.)

*Nonjudicial classification of rights.*—It does not, however, follow that irrigation districts may not comprise lands to which are appurtenant water rights acquired prior to the formation of the district where such rights are for a part only of the irrigation season or, in case the statute is sufficiently broad, where such lands are benefited in some other respect as a result of the district system. In such case the district may divide the water rights into classes for administrative purposes. Such classification is not, however, an adjudication, "and in no way prohibits or limits any user of water in having the question of priority between users settled and adjudicated in the proper courts of the State." (*Brose v. Nampa and Meridian Irr. Dist.*, 118 Pac., 505; 20 Ida., 281.)

The court concludes that the provision for classification is highly beneficial and "may be accepted by the consumers, and thereby much litigation and expense may be saved to the consumers." (*Id.*, 505.)

*Distribution of water.*—It may be said that the general law as to water distribution is applicable in the main as regards individual water users under an irrigation district.

For example, the duty to deliver water, the use of which has become a vested right of any landowner, irrespective of the difficulty or cost of carriage, devolves upon an irrigation district precisely as upon a water company under like circumstances. (*Niday v. Barker et al, Directors of Nampa & Meridian Irr. Dist.*, 101 Pac., 254; 16 Ida., 703.)

In its principal administrative duty of the delivery of water to the landowners the district is a self-governing community and the board has the power to establish and is enjoined to promulgate rules and regulations. With the performance of this function the courts are loath to interfere.

The board, however, must adhere to the principles of law and act impartially. There must be no discrimination between different portions of the district lands and the district must not assume jurisdiction for the distribution of water to one section while neglecting other lateral systems and district lands.

In the case of *Harris v. Tarbet et al, trustees of Logan Irr. Dist.* (57 Pac., 33; 19 Utah, 328), the board was remiss in this matter, as all lands of the district were being equally assessed; and all were



equally entitled to the benefits to be derived from the district organization. The court held:

As such refusal and neglect affect the rights of the appellant and others who own land in such district, and who have borne their portion of the burden to maintain the corporation, as shown by the testimony, the trustees ought to be compelled by mandamus to perform their duty under the law. We are of the opinion that, under the proof in this case, the court erred in denying the writ. (Id., p. 34.)

*California rule in distribution.*—The leadership of California in irrigation district matters halts very notably when the distribution of water among the district-law landowners comes into question. The law in that State is that all waters shall be distributed for irrigation purposes by ratable apportionment to each landowner upon the basis of the ratio which the last assesment of each for district purposes bears to the whole sum assessed upon the district, with a proviso that any landowner may assign for any year the right to the whole or any portion of the waters so apportioned to him.

This rule may have originated in early doubts as to the constitutionality of any other rule, but it requires what is now a generally discredited criterion for water delivery.

*"Beneficial-use" rule preferable.*—Many of the States at first followed California in this respect, but most of them have turned to the more equitable and economically sound principle of distribution in accordance with the beneficial use of the water upon the respective tracts irrigated. In Utah the State officials allot the water. In Texas it is required that as a prerequisite to his right to demand service each landowner make an annual statement to the district board, setting forth the areas he will farm that year in each of the various crops to be raised. This is an aid to distribution in accord with beneficial use. For the beneficial-use rule, as applicable to an irrigation district, see *Niday v. Barker et al.*, Directors (101 Pac., 254, 256; 16 Ida., 703).

It is required of the board to promote efficiency and prevent waste.

It is the duty of the canal company to turn the water out either from the main canal or lateral at the most convenient point to the consumer (sec. 3288, Rev. Codes), and this should be at such place as to cause the least waste by seepage or evaporation. (Id., p. 255.)

*Rotation in service.*—On the other hand the statutes frequently, particularly where the earlier law has not been fundamentally modified, require the apportionment of the water, whenever the supply shall be insufficient to meet the continual wants of the owners of water rights, upon certain or alternate days on a rotation system.

Such a degree of rotation of service was sufficiently progressive during the original enactment of irrigation district laws when landowners were deemed to need a continuous flow. The present sentiment in irrigated localities and the trend of judicial opinion is becoming constantly more favorable to a system of rotation between users under ordinary circumstances, and unless individual holdings are still so large that rotation between various parts of the same ranch provides due economy. This practice, involving the use of larger heads for shorter intervals under normal circumstances, tends toward economy in the use of water and in the time of the irrigator, and tends toward lessening the seepage and alkali difficulties. Hence a by-law requiring rotation would, we believe, be held valid by the

courts, at least in the absence of contracts whereby a continuous flow might become a vested right.

*Denial of service for nonpayment.*—The right of the directors to deny water service in case of failure to pay the district assessments has not been thoroughly worked out in the statutes or decisions of courts. Nebraska has a clause permitting the adoption of a by-law for the denial of service in case of delinquency exceeding a two-year period. (Infra, p. 121.) Districts which cooperate with the United States under contract are authorized by the respective statutes to contract for operation in such fashion as to comply with the Federal laws and the rules and regulations established thereunder, and the Federal laws require the denial of water service after a delinquency in construction or operation and maintenance payments exceeding one year. (Reclamation extension act of Aug. 13, 1914, sec. 6, 38 Stat., 687.) Where the method of securing revenue for operation and maintenance is by tolls and charges, the denial of water service for failure to pay would extend to the operation and maintenance charges.

*District responsibility—Theory.*—In Idaho, at least, the general operations of an irrigation district are proprietary rather than governmental. A district, therefore, upon acquiring the system of an antecedent private corporation obtains no greater or governmental powers therein to the curtailment of the powers of a city through which the district waterways are built. The supreme court has held:

An irrigation district is a public quasi corporation, organized, however, to conduct a business for the private benefit of the owners of land within its limits. They are the members of the corporation, control its affairs, and they alone are benefited by its operations. It is, in the administration of its business, the owner of its system in a proprietary rather than in a public capacity, and must assume and bear the burdens of proprietary ownership. (*Nampa v. Nampa & Meridian Irr. Dist.*, 115 Pac., 979, 982; 19 Ida., 779.)

*Liability for official negligence.*—Accordingly there is a distinction between public corporations of a governmental character and irrigation districts in the liability resulting from the negligence of their officers. In the Federal case of *Noon v. Gen. Irr. Dist.* (205 Fed. (1913), 402), the court having in mind the Idaho view, it was held that the district was liable:

It is of no avail to say that a legal responsibility might rest upon such negligent officers or agents individually. It is not to be presumed that the particular individual chargeable with the negligence in any given case would possess such financial responsibility as to make that remedy of any practical value. As well might we relegate the injured railway passenger to an action against the negligent engine driver instead of holding the corporation responsible. I can see no reason why, in a case of this character, or in the supposed case where a farmer's crop is flooded and destroyed by the negligent breaking of one of the defendant's ditches, the industry instead of the individual or society at large should not bear the loss. (Id., 405.)

In the Dakotas, by statute the district is liable for failure to deliver water in case damage ensues, provided the landowner takes the steps prescribed by law. (See infra, p. 137.)

*Official liability.*—The district officers in common with officers of other public, quasi public corporations, and private corporations engaged in public service may be mandamused to deliver water and to perform their necessary functions. (See *Harris v. Tarbet*, 57 Pac.,

33; 19 Utah, 328. *Niday v. Barker et al*, director, 101 Pac., 254; 16 Ida., 703.)

Several of the States have also recently made provision for the recall of district officers before their tenure of office expires. Reference to the California provision will be found below. (*Infra*, p. 92.)

Several of the States have statutory provision in general for the punishment of district officers who are guilty of breach of trust. They are also liable upon their bonds.

*The privilege of transfer.*—The transfer of water from one owner to another is a privilege of doubtful expediency. In California it partially, at least, results from the method of apportionment of water by the board upon the basis of the assessment paid as contrasted with the beneficial use rule. The supreme court of that State has held that the right exists only for transfers to lands within the district. (*Jenison v. Redfield*, 87 Pac., 62; 149 Calif., 500.) Some of the statutes provide that the privilege of assigning a water right is limited to those who have paid their assessment in full. The privilege is generally limited to the current year only.

In Utah, landowners may assign water privilege from one landowner within the district to another for one year only, provided both have paid their assessments, and the board is authorized to lease water to occupants of extraneous State and Federal land upon the same terms as though they were within the district, but water may be leased to other persons outside the district at one and one-half times the rate paid by owners within the district. (*Infra*, p. 152.)

Another State provides that owners within or without the district may arrange for an exchange of water retaining the privilege of resuming the former status, the arrangement being by contract with the district. (See Montana provision, *infra*, p. 118.)

The tendency of the assignability of the water is to lessen one of the advantages of irrigation district organization, namely, the early placing of the land under cultivation on account of assessment for construction and operation. If a landowner may derive a profit from renting from year to year the water which is assigned to him to others, he can afford to defer development and possibly may speculate in the water right. It is preferable to have powers of this kind vested in the board and to have the revenue inure to the district as a whole thus making the landowner realize that it is to his interest to make beneficial use of the right to the water thereby placing the district on a firmer financial basis.

Some of the States provide that districts cooperating with the United States pursuant to contract with the Government may lease water to private landowners, entrymen, or municipalities in the neighborhood. (See Colo., 1, 1917, pp. 294, 295.)

*Transfer of water in case of subirrigation.*—Reference has been made elsewhere (*infra*, p. 80) to the dangers of general provision for the release of district lands from liability on account of subirrigation. Where provision, however, is made for the simultaneous binding of another tract for the payments in lieu of that released, the arrangement is highly beneficial, except where it tends toward procrastination in making provision for drainage. An excellent provision on this subject is contained in the Nebraska law. (*Infra*, p. 121.)

*Power development.*—The general authority conferred to construct irrigation works doubtless includes the construction of works

for the development of power for the reclamation of district lands without express mention thereof. Where, however, the plans do not or can not include pumping for district irrigation, or where there is excess power or power privilege beyond the need of such above-gravity units, the district should be empowered to develop the power resources existing as possible by-products of its works, and should be authorized to dispose of the same preferably within the district, or if they are not susceptible of economic use within the district, for use beyond its confines. Where the use is for irrigation, the authorization should not be limited in duration, otherwise a limit of leasehold is highly desirable.

The California provision restricts the district in its power operations to such efforts as will not result in increased expenditure and to the making of a lease not to exceed 25 years. The penalties for failure to pay on the part of the lessee are inequitably drastic. (See *infra*, p. 93.)

The board is empowered in Idaho to construct and operate electric power plants and to sell surplus power for delivery at the plant or within the district, but the contract can not extend for more than five years. This restricts the use of the power for the most valuable purpose of pumping for irrigation, since landowners should not be called upon to submit to a terminable privilege. (*Infra*, p. 113.)

Provision in New Mexico is broader, permitting the construction and control of plants and the sale and lease of electrical energy to municipalities, corporations, or persons. (See *infra*, p. 131.)

The Oregon law permits the furnishing of electric power for use within or without the district boundaries upon proper compensation. (*Infra*, p. 144.)

The Washington provision is more comprehensive and the great powers conferred upon the district board should probably be subject to supervision by State authorities or to ratification by the electorate. It reads as follows:

The board of directors shall have the power to sell, lease, or rent the use of water and power, or either, for delivery to occupants of public or other lands situated within or adjacent to the district, or to municipal corporations, or at such prices and on such terms as it deems best, provided no water or power shall be furnished for use outside of said district until all demands and requirements for water and power for use in said district are furnished and supplied by said district. (Rem. Codes and Stats., 1915, sec. 6426.)

*Relations with cities.*—As already pointed out, the district in some States may include cities and towns, in others not (*supra*, p. 15). Some of the difficulties involved when authority to include them is acted upon will be found illustrated in the case of *City of Nampa v. Nampa & Meridian Irr. Dist.* We are inclined to sympathize with the court's view:

The case demonstrates the inapplicability of the irrigation district law to lands within cities and towns. But it has been held in *Nampa & Meridian Irr. Dist. v. Brose* (11 Idaho, 474; 83 Pac., 499) that lots and lands within a city or village may be included in an irrigation district if they will be benefited thereby, and where such lands are included within the district the owners thereof are entitled to enforce their rights against the district under the law as it stands, regardless of what that law ought to be. (115 Pac., 979, 983; 19 Ida., 779.)

Most of the district laws permit of leasing water to cities and towns and entering into permanent contractual relations for the

delivery of water to the municipalities. The city then has the responsibility of retailing the water and of collecting from landowners, the district being left to deal with larger landowners, a task for which its form of organization is best fitted. This is much preferable in point of facility in operation as well as in view of considerations pointed out on page 16 above.

*Financial policy.*—As regards the financial policy of operation by the district it has been held that—

The Irrigation act is evidently framed upon the theory and with the intention on the part of the legislature that the affairs of the district shall be conducted upon a ready-money basis and not upon credit. (*Hughson v. Crane*, 47 Pac. 120, 122; 115 Calif., 404.)

Nevertheless, the district is a self-governing institution and the courts seldom interfere in the exercise of the discretion of the board. The Washington Supreme Court has held:

The board of directors are clothed by the statute with a wide discretion as to the manner in which they shall manage the business of the district, and the courts are not warranted in interfering on any mere question of good business policy. Nothing short of a gross abuse of their powers will warrant such an interference. (*Hanson v. Kittitas Rec. Dist.*, 134 Pac., 1083, 1088, 1089; 75 Wash., 297.)

New Mexico only has made express provision for the assumption of the assets and liabilities of water users' association when any project cooperating with the United States changes from a private to a public-corporation basis by organizing a district. Provision is also made in the same State for the district to promote agricultural production and marketing facilities and to appropriate money for such purposes.

*Eminent domain.*—The power to condemn property is in general sufficient and in accord with the powers ordinarily conferred upon quasimunicipal corporations. The Oregon provision includes the right to condemn property already devoted to public use whether for irrigation or otherwise which is less necessary than the use proposed by the district, and the use of water for irrigation by districts is declared to be a public use more necessary than any other public or private use to which the water may be appropriated within the district. (See *infra*, p. 143.)

*Special privileges.*—The districts are donated rights of way by most legislatures over State lands, and in some States irrigation-district systems are exempt from taxation. The latter provision accords with sound policy since the construction of irrigation systems increases by many times their value the taxable property of the community.

*Operation by the United States.*—Where an irrigation project has been built by the Government pursuant to provisions of Federal and State law (*supra*, p. 21), a district may contract for operation and maintenance of the works to be conducted by the United States, and on the large majority of the projects constructed by the United States and organized as irrigation districts Federal operation is in vogue.

The Federal law provides for turning over the operation and maintenance of an irrigation system so constructed to the water users organized either as an irrigation district or as a water users' association when request to such end has been made by water users and

the Secretary of the Interior deems the transfer proper. (38 Stat., 687.)

*Carey Act projects.*—The Idaho Legislature is the only one that has made provision for district organization of Carey Act projects. (Infra, p. —.)

*Mass meetings—A suggestion.*—One general omission in the district laws is that of any provision requiring an annual meeting at which general policies can be discussed and the public sentiment of the district clarified. It is probable that the results would be beneficial and many districts are doubtless making it a custom. An appropriate time for meeting perhaps would be shortly before the annual election. Nominations for officers which are not adequately provided for as a rule might then appropriately be made, and matters to be submitted to the electors could be threshed in an open forum. Express provision for special elections upon various occasions is made by all district laws, and these elections could often be held simultaneously with the general election and after full discussion. A provision in the law fixing a convenient date annually would supplement and make the custom, now in use in some districts, only more effective and soon place same in use in all districts.

Such a custom furthermore would assist in mutual understanding, promote judicious public sentiment on district affairs, tend toward wise selection of officers, keep the board more adequately advised of sentiment, and relieve the local mind of recurring suspicion that "somebody" is diligently engaged in "sitting on the lid."

#### SUBDISTRICTS FOR LOCAL IMPROVEMENTS WITHIN THE MAIN DISTRICT.

*Necessity of provisions for local improvements.*—It often becomes desirable after the formation of an irrigation district to provide local improvements therein that will be limited in beneficial effect to a portion of the lands embraced within the district, and for which it would be unfair or impracticable to assess the district as a whole. The purpose may be local drainage, concrete lining, improvement of local structures, a piping system, domestic water, or the like.

*Statutory provision necessary.*—It has been held that works of this character may not be undertaken by the irrigation district, which has no power to make a local assessment over a limited area within the district for any purpose, without an express provision of law. (Colburn v. Wilson, 132 Pac., 579, 581; 24 Ida., 102.)

But when the legislature has made such express provision there is no doubt of its validity. In this regard the rights of irrigation districts would be upheld under the same principles adopted for districts formed for reclamation by drainage. To quote from a Federal court:

Under the authorities, as I view them, it is within the authority of the legislature to create a subdistrict for reclamation of a larger district theretofore created. The distinction between ordinary taxes levied for general governmental purposes and assessments for improvements has been pointed out in a number of cases. It is for the legislature to decide the question of the necessity for such improvements and the area and manner of making same, unless there is such a flagrant abuse of the power, because of arbitrary and wholly unwarranted legislative action, as would authorize a court of equity to intervene to protect a constitutional right of the landowner. (253 Fed. (1918), 246, 253.)



As yet Nevada and Washington only have made provision for this important line of usefulness. Both laws were enacted in 1917. While these two statutes have the same general purpose, the means provided are radically different.

*The Nevada provision.*—Nevada has provided (L. 1917, p. 263-264) that when the necessity for drainage or other local improvement arises within any of the regularly established divisions of an irrigation district, a petition to the district board signed by a majority of the landowners in the division, representing at least one-fourth of the acreage thereof, describing the proposed improvement and designating two local directors of the division, serves to initiate proceedings looking toward the creation of a local improvement district. The board of directors of the irrigation district appears to have no discretion in the matter of granting the petition, their duty being merely to ascertain whether the law has been complied with by the petitioners. If so, the petition is granted as a matter of course. The third member of the local board is the district director from the division concerned. The division then has an organization independent of the district and is a separate entity for the purpose of contracting indebtedness, constructing local drains, laterals, and other improvements the benefits of which are confined to the division acting in all such matters through the local board, which exercises, for the local organization, the same powers as the district board exercises for the main district.

The local improvement division, after a two-thirds vote, may issue bonds to secure the funds necessary for its works, or enter into contract with the United States for construction, and provide for the payment of operation and maintenance and incidental expenses in connection therewith as freely as the district itself might do, and subject to no control whatever from that organization.

Judicial confirmation as in the case of a district bond issue or contract is provided for the division.

Prior to the election the benefits must be apportioned to the lands of the division and the apportionment certified to the board of directors of the district, which in turn reports the same to the county officers in the same manner that the district apportionment is reported. If the issue of bonds or contract with the United States shall fail to receive the necessary number of votes at the election the local board is dissolved.

*The Washington provision.*—In Washington more comprehensive provision for local improvement districts is made. (L. 1917, p. 736-740.) Such subdistricts may embrace only the lands to be specially assessed for the works. Petition for organization, signed by owners of one-fourth of the acreage of such lands, is filed with the district board. After the assistance of a competent engineer and advertised hearing, the board passes upon the feasibility of the project, and has discretion to accept, modify or reject the scheme, or to include additional lands or to exclude lands.

The costs of the improvement are payable over a period not exceeding five years by warrants issued by the irrigation district, but the lands of the local improvement district are primarily liable for the indebtedness and they alone are assessed to meet the payments on the warrants. The warrants are a general obligation of the entire irrigation district, however, and it must make good any default on



the part of the local district, the local district lands being obliged to recoup the main district for all such disbursements.

The irrigation district may issue bonds in the usual manner and exchange them for outstanding warrants if desired, the primary liability of the local district remaining unchanged. Provision for judicial confirmation is made.

Contract may be made between the irrigation district and the United States for the construction of local improvements, for which purpose local improvement districts may be formed.

Control of the local enterprise remains in the hands of the irrigation district, all matters incident thereto, including assessments, collections, and disbursements being performed in the same manner as in the case of the district at large.

*A comparison.*—The ease with which the boundaries are determined and organization secured in Nevada, appears to be fully offset by the duplication of work incident to the maintenance of distinct legal entities within the same territory.

Moreover the Nevada law is not sufficiently elastic since the need for local improvements would seldom chance to coincide with the lines of an established division of the parent district. If the area to be benefited embraced only a small portion of the division, the disinterested majority might be unwilling to obligate the division for the costs. On the other hand, if the proposed improvement benefit lands lying in two or more divisions, the difficulties would clearly be multiplied and a separate organization would be necessary in each division, with separate boards, separate bond issues or series of warrants, separate assessments for benefits, et cetera.

In contrast the Washington law provides that the boundaries of local districts shall be defined with reference only to the plans for the improvement and the lands to be benefited.

Still more important, no separate entity is created, and the entire matter in Washington is under the control of the parent irrigation district, while the local improvement district exists merely to define the lands that are to derive practical benefit from the proposed local works in order that the plans may be developed with special reference to such lands and that they may bear the expense incurred.

In the latter State furthermore, the main district, retaining control, has adequate power to protect itself against the assumption by a local district of an excessive debt which by over obligating lands within the local district might lessen its credit.

Certainly the Washington method, whereby the district board passes judgment upon the practicability of the proposed improvement and the ability of the local lands to pay the cost, and whereby the assets of the entire district are ultimately responsible for the bonds which are issued in its name, tends to give the local water users a far better market for the bonds issued for local improvement purposes. This feature has not yet been passed upon by the courts.

On the other hand, the Nevada law might give better results in cases where the main district is ultra conservative or its board is unsympathetic toward some needed and practicable local enterprise.

#### CHANGE IN BOUNDARIES.

*In general.*—The boundaries fixed at the time of the organization of a district are subject to change at any time by the directors or the

electors of the district, as the case may be, upon proper showing either that certain lands ought to be annexed to the district or excluded therefrom. It is generally expressly declared that such changes shall not in any way affect or impair the validity of the organization of the district or any of its rights and privileges. District obligations, moreover, continue unimpaired, and all liens which might at any time have attached for the benefit of creditors are declared to remain intact.

It is also almost always provided that where such district has entered into contract with the United States, the written assent of the Secretary of the Interior to any change in the boundaries must be obtained and placed on file in the office of the board before any change in boundaries is effected.

Whenever the area of the district is changed either as the result of annexation or exclusion, it is in most States the duty of the board of directors to redivide the district at least 30 days prior to the next general election so as to keep the various divisions as nearly equal in size as practicable.

The final order of the board changing the boundaries is in most jurisdictions required to be filed for record in the recorder's office in each county concerned.

*Annexation.*—Contiguous lands lying adjacent to any district may be admitted upon petition signed by the owners or holders of title to the land to be included, or by a majority of such persons, who must in some States represent at least one-half of the lands to be annexed. This petition must describe the lands proposed to be included and be acknowledged and filed with the district board. In Idaho it is provided that the Secretary of the Interior may sign a petition for the inclusion of unentered public lands, while in California public lands of the United States adjoining a district may be annexed without petition upon order or resolution of the board of directors of the district.

*Same—Hearing.*—After due notice has been published the board meets for hearing on the proposed annexation, at which time objections if any are considered. Objection may generally be made by "any person interested in the district or the proposed change of its boundaries," and any person to be affected by the change who does not object is deemed to have consented.

*Same—Election may be held.*—If there are no objections offered at the hearing, the board may, in its discretion, include the lands or reject the petition. But if objections are offered by proper persons and are not waived, the board must call an election to determine whether or not the change of boundaries shall be consummated. A majority of the votes cast at this election determines the issue in most States, although there are a few exceptions to this rule, Oregon, for instance, requiring a three-fifths majority. Some States, also, expressly give a right of appeal to the courts by any objector whose protests are overruled by the district board.

*Same—Protest.*—Some States provide that if a written protest signed by a majority of the electors is filed within 30 days from the making of the order including the lands, such order and all proceedings upon which it is based are held for naught.

*Same—Payments upon admission.*—The board of directors may require, as a prerequisite for admission into the district, that the

owners of the lands to be included pay to the district such respective sums, as nearly as can be estimated by the board, as said petitioners or their grantors would have been required to pay to such district as assessments had such lands been originally included in such district.

The United States Circuit Court of Appeals in construing a provision of this character in the Colorado law held that lands included without being required to contribute their proportionate share of the expense of the project from the beginning were nevertheless legally annexed to the district. The enactment in question is "for the benefit of the district and is not made a condition precedent by the statute, and the board waived the requirement of payment at that time by its action in including the lands." (*Nile Irr. Dist. v. Gas Securities Co.*, 248 Fed. (1918), 861.)

One of the important considerations often bearing upon annexation questions is the sufficiency of the water supply to irrigate the lands to be included without jeopardizing the productivity of the lands already incorporated. California expressly gives the district board the power to impose upon the lands to be included such proper conditions as will entirely protect the lands embraced within the original district boundaries. For example, it may provide for a priority of water rights in favor of the original areas, or make an additional annual charge against lands seeking to be included, or enter into such other arrangement as may appear equitable.

*Exclusion.*—The exclusion questions about to be discussed relate to a proceeding frequently undertaken long subsequent to the settlement of boundaries at the hearing upon organization. The proceeding differs in legal character from exclusion of lands described in the petition by the board of directors at the original hearing for the formation of the district. The petition therefor of landowners who have been included in the district is sometimes founded upon a desire for immunity from assessment and levy, and has an important bearing upon the credit of the district.

The district when originally organized often is not in possession of final plans, and, in the nature of the case, is frequently unable, on account of lack of credit, to make an exhaustive survey to determine where the diversion from the river can feasibly be made, and to map the alignment of the canal and the confines of the irrigable area. When a final survey has been made and final estimates prepared and the plans adopted, the organization has often been perfected and bonds issued. Thereupon lands lying too high to be irrigated from the system are morally, and should be legally, entitled to exclusion.

In various States provision is made to the effect that where from any natural cause lands can not be irrigated, the organizing board is without jurisdiction to include them and the taxing board is without jurisdiction to assess them for district charges.

Such a provision has been construed in a Nebraska case where complainants sought an injunction against assessment and exclusion from a district. The court reached the conclusion embodied in the following paragraph:

Whether a particular tract of land will be benefited by a proposed system of irrigation is a question which the legislature has confided to the county board. Whether a particular tract of land from some natural cause can not be irrigated is a question which goes to the jurisdiction of the county board

over such tract, and may be raised at any time in a proper case, because section 40, *supra*, expressly denies the jurisdiction of the county board to include such land in an irrigation district or to tax it for irrigation purposes. (*Andrews v. Lillian Irr. Co.*, 97 N. W., 336; 66 Nebr., 458.)

There is, however, another class of cases less meritorious which consists of those who desire exclusion upon the ground that they are already in possession of a water supply. These landowners sometimes have a partial supply and will be benefited by an irrigation system which would confer upon them a supplemental supply whereby the productivity of the lands can be increased, and it would appear that the plea for exclusion could equally well have been presented at the time of organization as provided by all of the statutes. Such timely presentation would afford release from the district before the bond purchasers had relied upon these lands as part of their security.

*Exclusion desired on account of seepage.*—There is a third class consisting of owners of lands which are without a water supply and are irrigable, but where the lands, through artificial rise of seepage due to the surrounding irrigation, have reached the status no longer requiring irrigation. In other cases the rise of ground water has proceeded to the point where the lands can no longer be cultivated. The hardship resulting from the assessment of the last-described lands is obviously very great, and accordingly the argument for their exclusion from the district and release from its obligations is extremely plausible from the purely local point of view.

Nevertheless, it is clear that their exclusion constitutes a lessening of the security of the credit of the district, and the statutes should not, and in the main do not, provide for such exclusion as would release them from liability without the consent of the bondholders.

This is as it should be, for the reason that the responsibility for the plans of the district, the feasibility of the project, and the construction of or neglect to construct drainage works is a responsibility which must be borne by the district and State officials and not by bond purchasers.

The relief from the difficulty is not through the exclusion of such lands and their release from the obligations of the district, but, on the contrary, would seem to be in the continuance of the solidarity of the district lands and the adoption of adequate means for drainage.

References to the exclusion proceedings will be found under the heading of each of the various States. Several of the States provide for exclusion only where written consent of the bondholders is procured, and most of them require the consent in writing of the Secretary of the Interior where contract with the United States has been made. Others provide for exclusion without the consent of the bondholders, but specify that the lands remain liable for assessment and subject to every charge that they would have been subject to had the exclusion not been granted. A few others permit exclusion without the consent of the bondholders and free the lands from charges.

*Proceedings for exclusion.*—Petition for this relief may be presented by the landowners desiring the exclusion, or in some States by a majority of them, and must describe the lands to be excluded. In some States the ground for relief must be stated in the petition,

and in the majority of States the written consent of the holders of all outstanding bonds or the consent of the Secretary of the Interior, as the case may be, must be filed therewith. In the absence of the creditors' assent, in the majority of States, the petition must be denied.

After published notice, hearing is had upon the petition before the board or directors, at which time any person interested in or affected by the change may appear and show cause in writing why the petition should be denied. The failure of any person to appear and object shall be taken as his assent to the exclusion of the lands or any part thereof from the district.

*Order by the board.*—If, after hearing, the board deems it not for the best interests of the district that the lands be excluded, it denies the petition; and if it deem it for the best interest of the district that the lands or some part thereof be excluded, and if no objection has been filed, the board may order the exclusion of the lands named in the petition or any part thereof.

*Election when necessary.*—In case any person has presented his objection in the proper manner at the hearing and has not withdrawn the same, an election is called, at which a majority of the votes cast determines whether the lands shall be excluded or not. The board then issues an order in conformity with the result.

Interested parties are sometimes given a right of appeal to the courts from an order by the board denying the petition. In other jurisdictions no provision is made for an appeal; but the landowner does not appear to be left without a remedy even in the absence of an express grant of the right of appeal, except in those cases where the matter is left to the discretion of the board of directors or to the suffrage of the qualified electors of the district, and the lands might lawfully be either included or excluded. In other words, if the law specifies, as most of the statutes do, that lands of a certain defined character shall not be included within a district or taxed for the purposes thereof, the owners of such lands can not be denied an appropriate remedy against an erroneous decision of the district board. In California this remedy was sought and allowed by the court through the medium of a writ of mandamus to compel the board to exclude lands which the law had expressly stated were not to be included in an irrigation district and which in this particular case were lands already having an adequate water right derived from another source appurtenant thereto. (*Harelsou v. South San Joaquin Irr. Dist.*, 128 Pac., 1010; 20 Calif. App. (1913), 324.)

#### INTERDISTRICT COOPERATION AND MERGER.

*Cooperative construction.*—Provision for cooperation between districts without merger or loss of separate corporate character is made by the Texas and Oregon laws to the end that joint action may be taken by two or more districts desiring to construct or purchase works in common. Authority in such case is granted for a joint contract and the employment of a general manager who shall have charge of the common enterprise. No contract is valid until ratified by a majority vote of each district. (See *infra*, p. 151 and p. 142.)

*Overhead or reservoir districts.*—There is, however, probably a growing need in some localities for provision for the creation of districts which might embrace within their boundaries other irrigation districts. No State has yet made a statutory effort in this direction.

The desirability of such provision of law would perhaps most frequently arise as the result of several irrigation districts having joint interests in the construction, operation, and maintenance of storage works, each district desiring to retain independence as regards its own diversion and distribution system.

In the case of a long river these districts might be many miles apart, and consolidation or merger would then be unpopular and impractical in matters of local administration, while the interests in common for the administration of the storage system might best be subserved through an overhead or reservoir district. Such a corporation would have a legal entity without disturbing those of the various districts and other organizations serving lands within its confines. The overhead district would be especially valuable in case of a need for important replacements of storage structure or in the event of an emergency when the necessity for contracting with numerous individuals, private corporations, and districts would in many cases involve a large amount of negotiation.

The statutory plan would need to be safeguarded with great care to the end that the prior and subsequent creditors of all districts receive full protection. This could best, and perhaps could only, be attained by judicious State supervision and registration of bonds.

*Districts for interstate projects.*—The fact that a number of the large projects, which must be undertaken before anything like complete utilization of the land and water assets of the West has been attained, will have an interstate character has not received recognition by the legislatures of the various States involved. Already there are several Federal projects constructed having irrigated lands in two States. Examples are the Klamath project, in Oregon and California; the Yuma, in Arizona and California; and the North Platte, in Nebraska and Wyoming; while the Rio Grande project is an interstate and an international project, having lands in New Mexico, Texas, and Mexico.

*Same—Method that of cooperation rather than corporate unity.*—The irrigation district, having taxing powers conferred by an individual State, and constituting for many purposes a legal subdivision of that State, can not exercise functions outside the boundaries of the State which created it and conferred upon it the requisite powers. No effort, therefore, toward the establishment of a district having interstate jurisdiction has been made. A few States, however, have made provisions which greatly facilitate cooperation between irrigation districts formed in different States.

*Same—California statute.*—California has the most comprehensive enactment on the subject. (L. 1917, ch. 591, p. 905.) There irrigation districts are authorized to contract with irrigation districts in adjoining States for "joint construction, acquisition, management, and control of diverting, impounding, or distributing works for irrigation or draining the lands within the boundaries of their respective districts." The agreements may provide for joint or several ownership, or ownership in common, of the property necessary or con-



venient for such cooperation, and jurisdiction over controversies is granted to any court of competent jurisdiction in the State.

It is expressly declared to be lawful to divert water from California for impounding in the adjoining State, or otherwise, for distribution to the lands of the cooperating district, regardless of State lines, or to divert water from such adjoining State for impounding or otherwise for distribution to the lands of the cooperating district in California or in the adjoining State. And in so far as is necessary, the cooperating district in the adjoining State may hold title to property in the adjoining State.

*Joint action in securing irrigation works.*—Other States have somewhat less elaborate provisions permitting one or more irrigation districts within such States to unite with one or more adjacent irrigation districts organized under the laws of any adjoining State for the purchase or construction of a common system of works for the irrigation of lands within such respective districts. Such districts are jointly given the same power of condemnation as is granted to one district alone. The cost of the construction or purchase of the irrigation system is required to be apportioned to each district in proportion to the irrigable acreage in each district, and the districts have undivided interests in the title to the works in the same proportion. (Gen. L. Oregon 1917, p. 764; L. Idaho, 1917, p. 73.)

At least one State (Idaho) provides, so far as one State can, for a joint commission, in the case of interstate projects, not exceeding seven in number, who shall be chosen by the boards of directors of the respective districts. Representation on this board is apportioned as nearly as practicable among the various districts in accordance with the acreage for which water is provided. The commission has the control and management of the works held jointly, subject to the boards of directors of the districts who can at will recall their respective representatives on the commission.

*Merger or consolidation.*—Many of the States make no provision for the merger or consolidation of existing irrigation districts, but the need for legislation along this line is beginning to be recognized.

The Oregon Legislature has authorized the merger of irrigation districts. There the board of directors of any district desiring to be included within another, addresses a petition to the board of such other district, showing the indebtedness of the district proposed to be included and the boundaries thereof. The board to whom the petition is addressed may accept or reject the same in its discretion. If it accepts, the board of the district desiring to be included, orders an election in that district, and the question is decided by a majority vote thereof. The indebtedness of each district is then ascertained and entered upon the records and a division of such indebtedness ordered, after which the consolidation is complete. (Gen. L. 1917, p. 772.)

Another plan is adopted in Nevada. The boards of directors of two or more districts in that State desiring to be consolidated into a single district, petition the county commissioners to order an election upon the question. This petition states in detail the terms upon which the consolidation is proposed to be made. The county board then submits the matter to the State engineer for investigation and report. After such report is received the county board acts upon the petition. If this is allowed, an order is made fixing the date of



the election. A majority of all the votes cast in each district is sufficient to authorize the consolidation. The county board then divides the district into proper divisions and appoints a director for each division, who serves until the next general election of officers, at which time a board of directors is elected. In case either district has entered into contract with the United States, no consolidation may be made without first obtaining and filing with the board of county commissioners the written assent of the Secretary of the Interior. (L. 1915, p. 445.)

The most apparent weakness in both of the methods above described is the failure to make express provision relative to bonds issued by the respective districts prior to their consolidation. Where the districts to be consolidated have outstanding debts such obligations can not be merged unless the bondholders assent.

The merger of obligations of districts having debts in an equal amount per acre or upon some other ground equivalent, might still be subject to attack unless the consent of the bondholders was required, for the reason that the bondholders in extending credit to the district would be deemed by the courts to have become entitled to rely upon the lands of the original district as security without sharing such security with any other irrigation district's creditors. The merger might or might not, as a matter of fact, furnish equivalent substitute security, but in legal principle would seem to constitute an objectionable substitution of security. The statute should safeguard districts against an attempted merger of indebtedness such as might lead to litigation by prohibiting consolidation of the indebtedness of two or more districts without the consent of the creditors.

The California statutes relating to consolidation and reorganization of swamp land and reclamation districts contain a very satisfactory provision on this subject, which is quoted below:

Such consolidation and reorganization shall in no manner invalidate the indebtedness of the original districts; and all the laws, rules, and regulations for the assessing, levying, and collecting taxes or assessments in said districts shall remain and be in force, and all assessments and collections required for the payment of the then outstanding indebtedness in said districts shall be the same as though they had not consolidated and reorganized until such indebtedness shall be paid and liquidated. (Deering's Political Code of California, sec. 3489.)

It is probable that the courts would bring about the same result irrespective of statute, but express statutory declaration has many advantages.

#### DISSOLUTION.

*Express provisions necessary.*—Irrigation districts, being in the nature of public or municipal corporations, can not be dissolved without express statutory authorization. (People v. Selma Irr. Dist., 32 Pac. Rep., 1047; 98 Calif., 206.)

*Practically all States permit dissolution.*—While the original California act appears to have made no provision for dissolution of districts, practically all irrigation district States now have enactments on the subject which in their diversity are quite confusing upon a mere cursory examination. On a closer view the general

plans and aims of the various statutes are found to be practically identical in the great majority of the States.

*Creditors to be protected.*—The importance of equitable dissolution laws from the standpoint of the bondholders and other creditors of the district is obvious. It is essential that payment of the bonds and other obligations of the district be fully provided for in any plan for dissolution, except to the extent that the law is to partake of the character of a bankruptcy act.

*Two general methods of procedure.*—A number of States permit the question of dissolution and the settlement of the affairs of the district to be determined by the district itself, either by the board of directors or through an election. But as neither the board nor the electors can be regarded in the light of wholly disinterested parties, it is believed that the bondholders and other creditors are more fully protected by the laws of those States which require the matter of dissolution to be finally passed upon by the courts after it has been assented to by a majority of the electors of the district.

*General outline of the statutes.*—While it is impracticable to discuss the laws of each State in detail, and well-nigh impossible to join them in one connected outline of procedure owing to their great difference in detail provisions, the following statement seeks to cover the general features.

Steps looking toward dissolution are initiated by a petition signed by a designated percentage, generally a majority, of the assessment payers, electors, or landowners of the district. In some States the petitioners must also represent a majority of the acreage; while in Utah they must represent a majority of the acre-feet of water. In Colorado a petition for dissolution may be signed by 75 per cent or more of the holders of the bonds of the district.

Sometimes the petition is required to set forth the fact that there are no outstanding bonds or other obligations. In other States the petition must propose a plan of settlement of the outstanding obligations, if any. Still other States provide two distinct methods of procedure, one applicable to districts having outstanding obligations, and the other to districts whose obligations have been fully settled.

Following the petition a special election is called, at which a majority of the votes cast is generally sufficient to determine the issue. If the election favors dissolution, then in some States the directors appear before the appropriate court with an application for an order dissolving the district, the court retaining jurisdiction until the proceedings have been completed, the affairs of the district settled, and the district dissolved. The right of appeal to a higher court is preserved. Elsewhere the settlement of obligations and the dissolution of the district are handled by the board of directors, and no automatic provision made for access to the courts.

*Adjustment of indebtedness.*—Under either method, the next step is the adjustment of the obligations of the district by settlement in full or compromise as may be found feasible. For this purpose the canals, franchises, and other property of the district may be sold, the method of sale being generally prescribed by statute. The obligations of the district are then liquidated to the extent of the funds available.

Some of the States provide, however, that the district, in redeeming its bonds, "shall in no case pay more than the market value of

such outstanding bonds, with interest, up to the time of payment." This might in some cases amount to a virtual repudiation on the part of the district, whose contractual obligation is, of course, for the face value of the bonds, regardless of their market price. Grave doubts are entertained as to the constitutionality of such a provision, which appears to be an impairment of the obligation of the district's contracts; and it seems to be also open to the strongest criticism from the standpoint of public policy. A district contemplating dissolution might be strongly tempted under such a law to engage in a propaganda of misrepresentation for the express purpose of decrying and minimizing its assets and thus reducing the market value of its bonds. The clause above quoted is found in the laws of Nebraska (R. S. 1913, sec. 3521), Oklahoma (L. 1915, p. 535), North Dakota (L. 1917, p. 159), and South Dakota (L. 1916-17, p. 586). The laws of the same States also contain, either verbatim or substantially, the following language:

In all cases where bonds and other obligations of irrigation districts shall be issued after the passage of this act, such bonds and obligations shall become subject to redemption by the board of directors of any irrigation district as soon as the property and franchise of such district shall be sold after such district has elected to dissolve as a district as herein provided. (L. North Dakota, 1917, p. 160.)

Generally provision is made that if the amount realized from the sale of the property of the district, together with such other moneys as may be available, is not sufficient to pay or settle the indebtedness, assessments are made against the lands within the district until the necessary amount is raised.

The final order dissolving the district is filed for record with the recorder of each county in which lands of the district are situated.

Where contract has been made with the United States no action shall be taken looking toward the dissolution of the district without the written assent of the Secretary of the Interior.

The Texas statute is unique, three methods of dissolution being given as alternatives. (*Infra*, p. 149.)

*The Colorado plan.*—Perhaps the most detailed of the enactments upon dissolution under direction of the court is that of Colorado (L. 1917, pp. 307-313), which has been covered quite fully in the digest of the laws of that State (*infra*, p. 105). There appears to be one feature of this statute, however, which may be justly criticized, and that is a provision in section 9, page 312, for the release of any particular tract of land after dissolution from the lien for district obligations. Such release is secured by paying the proportionate share of such tract of the bonded indebtedness. But the harmful effect of this provision is mitigated by the clause that "no plan of liquidation shall be approved by the court, which does not provide for the ultimate payment or liquidation of all the indebtedness of the district and adequate security for the holders thereof" (sec. 10, p. 312), and that in at least two other places in the same act the legislature expresses the intention to secure the ultimate payment of all indebtedness.

But a danger rests in the fact that the court is not precluded from deeming the pro rata apportionment of the debt in such fashion as fully to discharge the debt, if the assessments are fully paid, as a provision for the liquidation of all the indebtedness and as such compliance with the statute. Whereas in few cases where dissolution is

undertaken will it in fact discharge the debt. This is another case where apportionment and discharge of liens is strongly objectionable. (See *supra*, p. 57.) The flavor of the statute is not improved by a provision that a corporation may be formed to acquire the assets of the district.

#### SCOPE OF ENSUING OUTLINE OF INDIVIDUAL STATE STATUTES.

While most readers of this work will have ready access to the laws of their own jurisdictions, comparatively few will have opportunity to compare the statutes of most of the others of the 17 irrigation district States. For this reason it is believed that a digest of the laws of the various States prepared not for the purpose of furnishing detailed information, but merely to sketch their outlines and illustrate the somewhat different angles from which the legislatures have approached the subject, will be of value.

Such is the principal aim of the following brief summary of the laws of the respective States. No attempt has been made to give a comprehensive survey of the statutes, those points wherein a law follows the usual form in a general way being merely touched upon or perhaps omitted altogether.

On the other hand, unique provisions, especially those exhibiting new tendencies or pointing the way to possible future developments, whether for good or ill, are given more prominence, and sometimes commented upon with a view to encouraging constructive comparison and criticism.

The irrigation district, however, is the creature of statute, and those who have to do with them must necessarily consult the law itself constantly. A digest, therefore, would be a dangerous, rather than a helpful substitute for the law itself, if used as a basis for action in irrigation district affairs.

Hence, we have purposely avoided giving the periods during which jurisdictional publications run, the requirements as to what important notices should contain, the statutory dates and periods in the assessment procedure, and other matters of a similar character.

#### ARIZONA.<sup>1</sup>

*Formation.*—The Arizona irrigation district act is to be found in the session laws of the second special session of the legislature. (L. 1915, ch. 8, p. 62.) This act was an entirely new law, repealing the former irrigation district act and granting to any irrigation districts formed under the previous act the privilege of coming under the provisions of the new act after a special election carried by a majority vote. (Secs. 29 and 30.)

Irrigation districts in this State are initiated by a majority of the resident holders of title, or evidence of title, including homestead entrymen or purchasers of State lands who petition for the organization of the district to the board of supervisors. The object of organization is simply that of provision for the irrigation of the district lands. Owners of lands included within the boundaries who have

<sup>1</sup>See page above for the purpose and scope of this discussion. See also Addenda, p. 165, for 1919 amendments.

constructed irrigation works which have availed to supply not less than 25 per cent of the lands so owned, or which shall avail, within a period of one year after the organization of the district, for the irrigation of such aggregate areas, shall be exempted from the provisions of the law, if the water has actually been appropriated to beneficial use for such percentage of area. (Secs. 1 and 2.)

Districts are authorized to construct and maintain levees for the protection of district lands from overflow, the provisions of law being applicable for that purpose. (Sec. 14.)

Judicial notice is required to be taken of the existence of irrigation districts after the filing of certified copy of the order of the county board declaring the organization thereof, and a copy of such order shall be conclusive evidence of the legal sufficiency of all steps taken under the act in all court proceedings, except in a quo warranto proceeding instituted within one year from the date of such filing. (Sec. 10.)

*Elections and electorate.*—Upon the organization election a majority of the votes cast is sufficient. (Sec. 2, par. n.)

Electors under the Arizona laws are defined in two ways: "Qualified electors for bond issues and special assessments" must be real property taxpayers owning land and residing on lands within the district for district purposes and must be qualified electors of the political subdivision in which the district is situated. (Sec. 3.) "General electors" are qualified electors under the general laws of the State holding land in the district and residing in the county. (Sec. 3½.)

The recall provisions under the Arizona constitution are adopted as regards irrigation district directors. (Sec. 18½.)

*District indebtedness.*—Contracts involving more than \$10,000 and not more than \$25,000 require written authorization by not less than one-third of the qualified electors according to the number of votes cast at the last election. Contracts in excess of \$25,000 require an election such as for the authorization of bonds. (Sec. 5, par. a.) Bonds shall mature in not exceeding 30 years and shall bear interest not exceeding 6 per cent per annum. (Sec. 11, par. b.)

Provision is made that a landowner, whose title is inchoate, shall enter into contract with the board that upon receiving full title his land shall be subject to the bonds and other debts of the district and that in the meantime he shall pay his proportionate share of assessments. (Sec. 7.)

The installments upon the bonds are payable by a district from the twenty-first to the thirtieth years from the date of issue of the series, but the district may, by a majority vote, provide for an installment period beginning at an earlier date. In case the proceeds from the sale of bonds are insufficient to provide for the completion of the works and additional bonds are not voted, the board shall provide for the completion of the irrigation plans by a levy of taxes therefor under the act. (Sec. 11.) The bonds can not be sold for less than 85 per cent of the face value, any attempted sale at a lesser value being declared to be absolutely void. (Sec. 12.)

*Confirmation.*—Proceedings for confirmation of bonds in Arizona may be initiated not only by the board of directors but by any elector, taxpayer, or property owner. (Sec. 28.)

*Assessment.*—The real property of the district is declared to be and remain liable to taxation for payments on the bonds. Upon payment being made for any lands of the district prior to the maturity of any bond issue of that proportion of the bonded indebtedness which the acreage of such land bears to the total bonded acreage of the district, with interest to the following interest-paying day, the tracts so paid for shall be released from further tax levy for the bonds then existing, except as in the act otherwise provided for tax levy in the event of default at maturity of bonds. (Sec. 13.) In case of such default by the district, the lands, if any, released by payment become taxable again to render payments to the bondholders. (Sec. 16, par. e; see comment, *supra*, p. 58.)

Assessments are initiated by the board of directors, who make an annual estimate of the moneys required for the next fiscal year, including provisions for the tax-sale purchases of delinquent district lands. Certified copy thereof is transmitted to the county board or boards with other specified information. Appropriate columns are provided in the regular State and county tax roll for the entry of district taxes. These taxes are required to be levied at a uniform amount per acre, and the county board is required to add to the amount certified by the district board 15 per cent of the gross amount for contingencies and to fix the resulting proportionate "rate amount per acre at which each acre of taxable lands of such district shall be taxed." The customary functions are performed for the district by the county assessor and the county treasurer. (Sec. 15.) The treasurer of the county wherein the district office is located is also ex officio district treasurer. (Sec. 4.) Should the directors fail to provide estimates and certificates as required, the board of supervisors must make the levy as they may deem sufficient. The district and county boards and other officers may be compelled to act by mandamus. (Sec. 15.)

More than usually detailed provision is made for the creation of separate funds, and it is provided that the district shall not pay out of the bond or interest fund moneys due on any subsequent issue of bonds until all matured bonds and interest of all prior issues have been paid or a fund has been created for their payment. When moneys resulting from prepayment of assessments are available for the payment of a part of the bonded indebtedness, bonds are called for, beginning with the highest numbers.

District taxes become a lien, as other State and county taxes, the provisions of the general revenue laws being applicable as to assessment, levy, and collection, except as modified to meet the requirements of the act, and as to the sale of property when delinquent. (Sec. 17, par. a.)

The district is authorized to become the purchaser at delinquent-tax sales in the same manner as individuals, and the board has the power to provide funds for such purchases and to dispose of the property purchased for an amount not less than the amount paid, with interest at 6 per cent. Upon petition, however, of five qualified electors, the question of the resale of lands taken by the district on any other terms shall be submitted to the qualified electors. (Sec. 17, par. b.)

Prior water rights are expressly protected (sec. 25), provision being made, however, for distribution of available water by the dis-



trict pro rata, as near as may be, and for delivery of the supply upon alternative days. (Sec. 24.)

*Exclusion.*—Under the exclusion provisions it is stated that the lands which become free from the district are not to be liable for district debts thereafter created, but for previously contracted liabilities the exclusion does not avail. (Sec. 26, par. f.)

*Dissolution.*—Petition for dissolution must be signed by a majority of the owners of land addressed to the board of supervisors, setting forth that all indebtedness has been fully paid. (Sec. 27.)

*Activities under Federal law.*—Cooperation with the United States is provided in Arizona by separate act approved March 8, 1917. (L. 1917, p. 26.) This measure expressly provides for cooperation in the construction of drainage works and levees, as well as for irrigation. (Id. p. 27.)

It is provided that the district shall not be dissolved, its boundaries changed, or any specific tract released which has been bound for the purpose of paying toward the bonded indebtedness to the United States except upon the written consent of the Secretary of the Interior.

#### CALIFORNIA.<sup>1</sup>

As we already pointed out, California has been the leader in the irrigation district movement. The original law, approved March 7, 1887 (L. 1887, 29), was fathered by Assemblyman Wright, of Stanislaus County, and resulted from the need for what later became the Modesto irrigation district. It was the first measure to prove of practical utility in the application of the public corporation to irrigation in this country. California is also entitled to credit for the leadership in the plan for the confirmation of organization and bond issues by proceedings in rem in the passage of the act approved March 16, 1889 (L. 1889, 212), commonly known as the confirmation act.

The present California act, known as the Wright-Bridgford Act, approved March 31, 1897, departed in a number of important respects from the original act; for example, in placing greater safeguards around the formation of irrigation districts, so that the present irrigation district law of California is further from the pioneer Wright Act than the laws of several of the Western States. This act has in turn been amended by later enactments.

The present law will be conveniently found in Deering's General Laws of California (1915, act 1726, pp. 662 to 707, inclusive, as amended by L. 1917, p. 751 to 769, and L. 1917, p. 915). Several supplementary laws will be referred to below.<sup>2</sup>

*Organization.*—It now requires a majority of the holders of title, or evidence of title, including evidence of the rights of entrymen or purchasers of lands of the United States or of California, such holders of title or evidence of title representing a majority in value of such lands according to the equalized county assessment roll for the last preceding year. The land must be susceptible of irrigation

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 165, for 1919 amendments.

<sup>2</sup> Section numbers hereinafter cited refer to act 1726 of Deering's General Laws of California, 1915, unless otherwise specified.

from a common source and by the same system of works, including pumping facilities.

As an alternative, organization may be proposed by written petition of not less than 500 adult petitioners residing in the proposed district, corporations, associations, or partnerships being qualified signers, the said petitions to represent not less than 20 per cent in value of the land within the district according to the said equalized county assessment roll. The irrigation district need not consist of contiguous tracts. (Sec. 1, as amended L., 1917, 571.)

The petition is presented to the board of supervisors of the county wherein the greater portion of the district shall lie, a copy thereof being filed with the State engineer.

*Functions of the State Engineer.*—After compliance with law as to the petition, the county board must postpone the hearing upon the same until the State engineer has made a preliminary investigation of the feasibility of the project. If the State engineer's report shall be adverse, the hearing is continued and eventually dismissed unless three-fourths of the holders of title shall favorably petition the board of supervisors in writing, or unless the plans for irrigation are so modified as to obtain the approval of the State engineer. (Sec. 2, as amended L., 1917, 755.)

The State engineer shall have authority to give information to persons contemplating the formation of districts, and when the department of engineering deems it in the public interest that surveys and investigations of projects shall be made at the expense of the State, the State engineer is required to make the same, and the State water commission has authority meanwhile to withhold from appropriation any unappropriated water likely to be needed therefor. (Sec. 2-a, as added by L., 1917, 755.)

*Hearing.*—If the project is acceptable or is rendered so hearing upon the same is held after notice and the boundaries are established. Adjournment may be taken from time to time. Areas already irrigated and riparian lands may be included in the district if the same are found by the county board to be benefited, or if the water used thereon or such water rights, in the judgment of the board, should be acquired for the district. (Sec. 2, as amended L., 1917, 752.)

Upon the final hearing, the county board embodies in an order its conclusions as to the genuineness and sufficiency of the petition and gives notice reciting the State engineer's report and defining the boundaries. No evidence against the sufficiency of the petition is receivable unless the board is satisfied that newly discovered evidence exists disproving the genuineness or sufficiency thereof. (Sec. 3, 664.) Such finding of the board is conclusive against all the world except the State raising the issue by suit commenced by the Attorney General. Such suit on the part of the State must be commenced within one year after the order of the county board. (Sec. 4, 665.) This provision as to the conclusive character of organization is in addition to the safeguard procurable by confirmation proceedings below outlined.

Upon organization election, after statutory notice, a two-thirds majority of all votes cast is necessary for the formation of the district. (Sec. 9, 666.)

*Officers.*—The number of divisions, and of directors, is five, with the proviso that if requested in the petition there shall be but three

divisions. The directors may be elected by divisions or at large as requested in the petition, but shall in any event reside in and represent separate divisions. (Sec. 5, 665.) The number of directors may, however, be changed after organization by a petition therefor, signed by the majority of the holders of title. (Sec. 28 as amended L., 1917, 761.) The board of directors, assessor, tax collector, and treasurer are chosen at the organization election, no office being combined with any county office. There is a provision for the consolidation of officers if requested in the petition for organization. (Sec. 7, 666.)

In most States the salaries have been fixed in too ironclad or too meager a fashion. California has attempted to adjust the matter and gives the directors \$4 per diem and 10 cents mileage, but provides that in districts containing 500,000 acres or more the directors in lieu of per diem shall receive \$150 monthly. The board fixes the compensation of all officers named in the act. Upon a petition of 50 freeholders a schedule of salaries and fees, including salary or per diem of directors, if petition so requests, must be presented at a general election. (Sec. 57, 691.)

Annual reports are required of the directors showing the financial condition, source of receipts, and purpose of disbursements. (Sec. 14-a as added L. 1917, 756.)

*Elections.*—Irrigation district elections are held each odd-numbered year with the provision that the term of office of officers elected at or after the general irrigation-district election in 1919 shall be four years. (Sec. 19 as amended L. 1917, 759.)

It is provided that no person shall vote at a district election unless he possess the qualifications required of electors under the general election laws of the State (Sec. 8, 666), and provision is made for the contesting of any election in the superior court within 20 days after the canvass of the vote, and a 30-day appeal period is provided. Any person owning property in the district liable to assessment may prosecute such contest. (Sec. 11, 666.)

*Nominations.*—Provision is made for nominations on the part of 10 or more requesting that certain persons be nominated. Their names then appear upon the ballot, although electors may vote for persons not nominated. (Sec. 22-b, 672.) The provisions of the general election laws are followed as nearly as practicable. (Sec. 23, 672.) The offices of assessor, collector and treasurer, although not joined pursuant to petition for organization, may be consolidated in the discretion of the board prior to an election. (Sec. 27, 674.)

*Recall.*—Elective officers may be removed or recalled after six months' tenure. To this end a petition must be filed with the secretary of the board of directors, signed by registered voters in number equal to 25 per cent of the highest vote cast for candidate for the office in question at the last general district election. The petition must state the grounds upon which the removal is sought and the signatures must be supported by affidavit of the person who circulated it as to the genuineness of the signatures. A special election follows at which a majority of those voting prevails. (Sec. 28½, 674.)

*Condemnation and property.*—The power of condemnation includes property in canals and works constructed by private owners, and the right to acquire stock in other corporations, domestic or foreign, owning waters, canals, etc., is given. The board may also acquire and operate property jointly with other irrigation districts or

irrigation corporations and may condemn the privilege of carrying water through canals of other corporations. (Sec. 15 as amended L. 1917, 756.)

Provision is made whereby the property held in trust by the district may be sold when no longer necessary for district purposes. (Sec. 29, 676.)

Where there is a mutual water company within an irrigation district organized to furnish water to specified lands within said district, the district board of directors is authorized to contract for the delivery of water for such lands through the mutual company. (Sec. 15-b, as added L. 1917, 758.)

*Leases.*—The board is authorized after due notice to lease the system of canals and works or any part thereof for the benefit of the district to the highest bidder, provided the lease shall not interfere with any rights that have been established. (Sec. 15-d as amended L. 1917, 758.)

*Distribution of water.*—All waters distributed for irrigation purposes must be apportioned ratably to each landowner upon the basis of the ratio which the last assessment of each for district purposes bears to the whole sum assessed upon the district, with the proviso that any landowner may assign the right to the whole or any portion of the waters so apportioned to him. (Sec. 18, 670.) This provision has been abandoned in several States where it was formerly in force, and the more modern apportionment in accordance with beneficial use has been adopted. (See *supra*, p. 70.)

*Powers.*—Whenever an irrigation district in the development of its works has an opportunity, without increased expenditure, to utilize its water for mechanical purposes, the board may lease the same. Notice must be given and the board must accept the best bid or reject all bids and readvertise for proposals. The district is prohibited from making a lease to exceed 25 years for such power privilege. It is provided that if the rental is not paid when due, the amount thereof shall be doubled, and if not paid within 90 days thereafter, the lease shall be forfeited together with all works constructed, owned, used, or controlled by the lessees. (Secs. 100-105, 705, 706.) Similar provisions with a 50-year limit of duration of lease were enacted in the act approved March 21, 1893, General Laws, 709.

*Interstate districts.*—Districts are also empowered to cooperate with irrigation districts in other States. (Chap. 591, L. 1917, 905.) The provisions for this purpose are outlined in the general discussion above (p. 82).

*Debt limitation.*—The usual provision renders void any debt attempted to be incurred beyond the express provisions of the law. (Sec. 61, 693.) The board before the first assessment may incur debts up to \$2,000, or, if the district has more than 4,000 acres, to one-half as many dollars as there are acres of land in the district, and for such purpose warrants of the district may be issued at not more than 7 per cent per annum interest. (Sec. 61, 693.)

No purchase or lease of waters, water rights, or any other property for any price or consideration in excess of \$10,000 in any district whose area does not exceed 50,000 acres, nor in excess of \$50,000 in any district whose area is over 50,000 acres and not over 200,000<sup>1</sup>

<sup>1</sup> There is an evident error here in the statute as to provision for the classification of districts.

acres, nor in excess of 100,000 acres shall be binding on the district, nor shall the consideration or any part thereof be paid or rendered until either petition by a majority of the holders representing a major part of the value of the land has been filed with the board, and an order of the board shall confirm the transaction, or a petition has been presented to the board signed by not less than 500 petitioners, who must be electors or holders of title to land or possessory rights in the district, said petition to bear the signature of the owners of not less than 20 per cent in value of the land. Such petition, however, is not required where the purchase or lease is specified in the plans approved by the irrigation district bond commission and adopted by the board of directors as provided in section 30 of the act or where it is among the purposes specified for any bond issue authorized by vote of the electors. (Sec. 15-a as added by L. 1917, 757.)

*Bonds—Purpose and authority.*—Authority to issue bonds is given at the outset of the district enterprise and also when the funds resulting from prior bond sales have been exhausted. (Sec. 30, as amended L. 1917, 761.) The board may acquire canals or works by purchase or condemnation or may exchange bonds for same or for capital stock in irrigation companies owning such canals or works upon such terms and conditions as the board may deem best. (Sec. 61-b, as added, L. 1917, 769.)

Following the making of plans and estimates of amount of money necessary to be raised, the board is required to submit a copy of the engineer's report to a commission consisting of the attorney general, the State engineer, and the superintendent of banks for certification as legal investments for banks, insurance companies, trust funds, and State school funds in the manner and under the terms which we have outlined in the general discussion. (Supra, p. 43.) The commission is required to examine the report, make additional surveys and examinations if deemed proper, and report to the board of directors with statement of conclusions, particularly as to water supply, soil, adaptability to irrigation, the probable amount of water necessary, need of drainage, cost, and the like, together with an opinion as to the advisability of proceeding with the bond issue (secs. 30-a and 30-b, as added, L. 1917, 762), or as to the necessity for changes of plans.

*Same—Resolution by the board.*—The board of directors, after receiving the commission's report, if it determine by resolution that the proposed plan is satisfactory, shall make an order determining the amount of the bonds to be issued. The law further provides that if the district shall issue bonds to carry out any plans approved by said irrigation district bond commission, it shall be unlawful for the district to make any material change in its plans without the consent of the commission. (Sec. 30-b, as amended, L. 1917, 762.)

*Same—Petition and election.*—Thereafter the board, when petitioned by a majority of the holders of title or possessory rights, representing a majority in value of the said lands, or when petitioned by not less than 500 petitioners who are electors or holders of land, including the owners of not less than 20 per cent in value of the land, shall immediately call a special election upon the issuance of the bonds. (Sec. 30-c, as added, L. 1917, 762.) If a majority of the votes

cast favor the bond issue, the same is deemed authorized. (Sec. 30-c, as added, L. 1917, 763.)

*Same—Terms.*—The bonds run for 40 years, the payment upon the principal beginning 21 years after the date and running for the remainder of the period, but the law provides that the bonds may be made payable at the end of a shorter period and the number of series may be made less than 20 if such propositions are presented and favorably acted upon at the bond election. The interest rate is not to exceed 6 per cent. (Sec. 31, 678.) Said bonds and the interest thereon shall be paid from revenue derived from an annual assessment upon the land within the district, and all land within the district shall be and remain liable to be assessed therefor. (Sec. 33, as amended, L. 1917, 764.)

*Same—Proceedings in confirmation.*—Proceedings for the confirmation of bonds are optional after the issue of bonds or the levy of any assessment, the purpose being to determine the validity of the bond or the levy of such assessments. The action is a proceeding in rem. (Sec. 68, 696.)

If the board fail to bring the proceeding, any district assessment payer may do so, the directors becoming parties defendant. (Sec. 69, 696.)

Where the board has exchanged bonds or agreed to do so, the court, in its confirmation proceedings, shall determine whether the bonds when delivered under the terms of the contract shall constitute valid obligations of said district as against all persons. (Sec. 61-c, 694.)

*Same—Legislative confirmation.*—Provision has been made for the legalization of bonds, issued and to be issued, sold by irrigation districts. In all cases subsequent to January 1, 1910, where the directors by resolution submitted the question whether or not bonds should be issued, and at the election so held four-fifths of the electors voting voted in favor of the issue, the power of the district to issue the bonds is declared legalized, ratified, and confirmed and valid, and the bonds are declared to be legal and valid obligations against the irrigation district whether sold before or after the passage of the act. (Act approved May 26, 1915, L. 1915, 837; Deering's General Laws, 707.) Moreover, numerous special acts by way of legalization of bonds of individual districts have been passed by the legislature.

*Same—Miscellaneous provisions.*—A special provision with an election is provided for the reduction of the bonded indebtedness when the bonds authorized exceed the amount needed in order to carry out the plans. If there are outstanding bonds, the assent of the bondholders may be obtained to the reduction of the bonded indebtedness in the same fashion as is prescribed for the assent of the bondholders to the exclusion proceedings. If such assent is not obtained, no reduction of the bonded indebtedness can be affected. (Sec. 99½, 705.) The requirement that the assent of the holders of bonds not retired be obtained would seem unduly to hamper the procedure. It would appear that their assent is not necessary to a step which will enhance their security rather than otherwise.

In case there be bonds voted, but not sold, provision is made that they be destroyed after an election, which must carry by two-thirds majority. (Secs. 106 to 108, 706.)

Special provision has also been made for the holder of bonds and interest coupons to surrender the same and have them canceled and



discharged after notice of hearing and consideration by the superior court, the proceedings being in rem. (Approved May 1, 1911, Deering's General Laws, 721.)

*District construction work.*—The construction provisions are similar to those in other States, the district retaining the right to construct under its own supervision if notice of award of bids does not result satisfactorily. (Sec. 53, 689.) During the construction work the State engineer shall have access to all plans and shall investigate same and make such reports to the board of directors as he shall deem to be in the public interest as regards districts whose bond issues have been certified by the State irrigation district bond commission. (Sec. 53-a as added, L. 1917, 768.)

The State engineer receives copies of all information and reports, including financial statements, and must report thereon with such recommendations as he may deem proper. He may initiate examination into the affairs of any district or call upon the authorities to furnish desired information and reports. (Sec. 54½, 690.)

Where the district crosses any railroad the owners of the railroad and the district unite in forming the intersections and crossings, and if they can not agree, the district may condemn the right to cross. The right of way is given to districts over any lands of the State, and the waters and water rights belonging to the State are dedicated to the uses of the district. (Sec. 56, 691.)

*Construction without use of credit.*—In case the money raised by the bond sales is insufficient or the bonds be unavailable for the completion of the plan adopted and additional bonds are not voted, it is the duty of the board to provide for the completion of the plan by the levy of assessments. First, however, an estimate of the amount required must be made and the question submitted to a vote of the electors upon the special assessment, a majority of the votes cast being necessary. (Sec. 34, 680.)

*Cooperation with the United States.*—Two acts for cooperation with the United States under the reclamation law were passed in 1917. That approved May 5, 1917 (chap. 160, 243), contains substantially the provisions recited under the foregoing general discussion for cooperation with the United States. It should be noted that as regards districts which cooperate with the United States the criterion for assessment is expressly the benefit derived to each tract. The statute thus departs from the ad valorem standard which prevails in the case of all other irrigation districts in California. In the ascertainment of the benefits derived by the respective tracts, the provisions of the contract between the United States and the district, the Federal laws applicable and the notices and regulations in pursuance thereof must be taken into consideration, and if the contract calls for the assumption by the district of indebtedness to the United States theretofore existing, there must be taken into account the provisions of existing contracts carrying such indebtedness and the amounts of such liens as may be released in pursuance of the contract between the United States and the district. The provisions of the general irrigation district law are made applicable, except as expressly or by necessary implication modified.

The district operation not related to cooperation with the United States are not affected by the act. (L. 1917, chap. 160, 243.)

An additional act was passed whereby not only irrigation districts but reclamation districts are authorized to enter into a contract with

the United States for drainage or irrigation of their lands or to prevent overflow under the provision of the reclamation extension act of August 13, 1914. It is provided in such case that the board shall provide by resolution for the payments of the amounts to become due under the contract with the United States by assessment upon the lands benefited, the same to be collected by the county tax collector or by any other officer authorized by law to collect assessments within the district. (L. 1917, 781.)

The rights of way, water conduits, reservoirs, and similar property of an irrigation district are expressly exempted from taxation for State, county, and municipal purposes. (Sec. 66, 695.)

The provisions for the assessment of State lands have already been recited in the general discussion under that head. (Supra, p. 61.)

When property is acquired by the district under any lease or contract on the installment basis the consideration shall be paid out of funds derived from the levying of annual assessments or from the collection of rates, tolls, and charges. The same option is given as to organization, operation, maintenance, and improvement expenditures. (Sec. 55, 690.)

*Assessment.*—It is the duty of the assessor of the district to assess all real estate in the district at its full cash value, to prepare an assessment book showing the persons, lands, including city and town lots, cash values, and other data. Improvements, including trees and growing crops, as well as buildings on lands or town lots, are exempt from taxation. (Sec. 35 as amended, L. 1917, 764.) In the event that any land which should be taxed for district purposes has been omitted from the assessment roll, special provision for the insertion of the same and the equalization of the assessment is made. (Sec. 39-e as added by L. 1917, 767.) Property which escaped payment for any previous year is assessable and falls under the same provisions and penalties otherwise applicable. (Sec. 35 as amended, L. 1917, 764.)

*Equalization.*—It is the duty of the board of directors after notice to meet for the purpose of hearing objections, if any, to valuations and to equalize assessments. (Secs. 37 and 38, 682.)

*Levy.*—After equalization the board must levy an assessment upon the district lands in an amount sufficient to raise the interest and principal to become due upon district bonds and all sums to become due from the district before the next annual assessment on account of rentals, charges for lands and other property acquired under lease or contract, and all unpaid warrants and other obligations reduced to judgment; also such an amount, not exceeding 2 per cent of the aggregate value of the lands, as the board may deem needed for general expenses. (Sec. 39 as amended, L. 1917, 765.) The secretary must compute the respective sums to be paid as an assessment upon the property enumerated in the assessment books. (Sec. 39-a as added, L. 1917, 765.)

Special provision is made authorizing the board, after a petition by the majority of the assessment payers, to make all assessments except special assessments payable semiannually instead of annually. (Act approved Mar. 19, 1909, 415; Deering's General Laws, 716.)

*Recourse—Where official neglect.*—If the board of directors neglect or refuse to cause the assessment and levies to be made, the duties

must be performed by the county assessor and the county board of supervisors. In such case the legal effect shall be identical with that resulting from action by the district officers, the district attorney of the county bringing suit for the cost thereof. In case the collector or treasurer of an irrigation district neglect to perform his duties the tax collector and the treasurer of the county must respectively perform such duties, paying the funds to the county treasurer, who shall disburse the same to the proper persons and shall not pay any part to the treasurer of the district until satisfied that the valid obligations for which assessment was levied have been paid. (Sec. 39-b, as added L. 1917, 765.)

The district attorney of each county in which the office of any irrigation district is located, must ascertain whether the duties relating to the levying and collection of assessments have been performed, and if he learn of neglect he must notify the county supervisors or other county official required to act. Unless such county officials proceed with the performance of their duty the district attorney is required to compel action by court procedure.

In case complaint shall be made to the attorney general of the State that the district attorney of any county has not performed any duty devolving upon him, or that he is not acting diligently, the attorney general shall make an investigation and take such measures as may be necessary, if any, to enforce the performance of the duties relating to levying and collection of assessments. (Sec. 39-c as added by L. 1917, 766.) In case there has been a neglect to perform any such duty within the time required and such duty is subsequently performed, the time within which all duties consequent upon the performance thereof must be performed is extended proportionately, together with the times when assessments become delinquent. (Sec. 39-d as added L. 1917, 767.)

*Delinquent-tax sales.*—Notice of date of delinquency is required to be given and thereafter, besides the customary machinery of delinquent-tax sale, the alternative remedy of suit against the delinquent is specified by the statute. (Sec. 41-a, 685.) Prior to the delinquent-tax sale, following publication of the delinquent list, the owner may specify what portions of property, if less than the whole, he desires sold, or the collector may designate the same, the sale being made to him who will take the least quantity of the land or the smallest portion of any undivided interest against which the assessment may be delinquent. If there be no purchaser the property is struck off to the irrigation district, and the collector is credited with the amount. Property sold to the district may be conveyed following a resolution of the board fixing the price at not less than the reasonable market value. (Sec. 44, 686.)

*Redemption.*—The redemption of the property may take place within five years from the date of purchase. (Sec. 47, 687). The 5-year period is not, however, operative as a bar to the dissolution of any irrigation district. (Sec. 47½, 687.)

Provision is made by supplemental act for the former owner of land sold for delinquent assessments and purchased by the irrigation district to redeem such property by paying interest at the rate of 2 per cent per month and all assessments and other charges and penalties. (Act approved Mar. 10, 1891, L. 1891, 53; also Deering's General Laws, 708.)

*Special assessments and emergency appropriations.*—The board may, whenever deemed advisable, call a special election for the raising of money for any district purposes at which a two-thirds majority of the votes cast is needed to authorize such special assessment. It is provided, however, that in case of an unexpected emergency interrupting the flow of water the amount of indebtedness incurred in repair, not to exceed \$40,000, may, in addition to the assessments herein provided for, be levied by the adoption of a resolution by at least four-fifths of the members of the board without the submission of the question to an election. (Sec. 59, as amended L. 1917, 768.)

The rate of special assessments levied is ascertained by deducting 15 per cent for anticipated delinquencies from the aggregate assessed value of the property as it appears on the assessment roll for the current year, and then dividing the sum voted by the remainder of such aggregate assessed value. The collections are made at the same time and in the same manner as other assessments provided for by act. (Sec. 60, 693.)

*Tolls and charges.*—The board of directors is authorized to make tolls and charges for the use of water payable in advance, and in case the same are unpaid they may be added to the annual assessment ensuing. (Sec. 39-f. as added L. 1917, 768.)

*Funds.*—The funds are divided into the bond fund, construction fund, and general fund (sec. 67, 695), with authority to transfer to the general fund moneys remaining unexpended after provision for the purpose has been made. (Sec. 67-a, as added L. 1917, 769.)

*Exclusion proceedings.*—Petition for the exclusion of lands follows somewhat the usual course (sec. 74, 697), and when the matter is heard the board is required to exclude from the district lands which can not be irrigated from or which are not susceptible to irrigation from a common source or by the same system of works, with the proviso that no land irrigated by pumping from underground sources shall be entitled to exclusion on that account, if it shall be shown that such land is or will be substantially benefited by subirrigation from the district works or by drainage provided or required by law to be provided by the district. But no owner shall be required to pay assessments other than for interest and principal on the bonds on any land which when the district was organized was irrigated by means of water pumped from an underground source and which has been continued each year to be irrigated exclusively by such means. (Sec. 78, 699.)

If there be outstanding bonds the holders thereof may assent to the exclusion, and in such case the lands so excluded shall be released from the liens of such outstanding bonds. (Sec. 79, 699.)

*Bondholders protected.*—Nothing in the act, however, is to operate to release any land excluded from any obligation to pay or discharge any lien of valid outstanding bonds or other indebtedness of the district existing when the petition for exclusion was filed, but said land shall be held subject to all outstanding obligations then existing as though the petition had not been made or the land excluded, and all remedies to compel payment remain as before, except that lands so excluded shall not be chargeable for any obligation incurred after the filing with the board of the petition, and, further, that the provisions shall not apply to outstanding bonds whose holders have assented to the exclusion. (Sec. 84, 700.)

*Annexation.*—Petition for inclusion may be made by holders representing one-half or more of a contiguous body of land adjacent to the boundary of the district. (Sec. 86, 701.) The public lands of the United States adjoining the boundaries of a district may be included by order of the board of directors without a petition therefor. If the inclusion would be injurious to the lands of the district, either impairing the water right or requiring greater expense, the board may prescribe conditions by providing for a priority of water right or requiring the payment of an additional charge, as may seem just. "If such inclusion is upon petition of property owners, all such property owners must sign and acknowledge an agreement with the district, specifying such conditions and describing the land so to be included." (Sec. 90, 702.)

About the usual provision is made for an election in case there is opposition to the inclusion, a majority of the votes being sufficient. (Secs. 91 to 97, 703 and 704.)

*Dissolution.*—The dissolution proceedings are more elaborate in California than in most of the States. Where contract has been made with the United States, no proceedings shall be entertained by any court until the written assent of the Secretary of the Interior has been given to the dissolution. (Act Feb. 10, 1903, L. 1903, 3, as amended; Deering's General Laws, 711.)

The proceedings may be initiated under alternative plans:

(a) The petition for dissolution must be signed by a majority of the holders of title, or evidence thereof, to district real property representing a majority in value. The amount of all indebtedness must be set forth, together with the assets, including irrigation system and water rights. (Id., 711.)

(b) If, however, an irrigation district has no indebtedness not barred by the statute of limitations and no assets and has ceased to be a going concern and is without an irrigation system carrying water to the residents of the district, the petition need only be signed by two-thirds of the qualified electors and by the holders of title, or evidence thereof, representing at least 50 per cent of the acreage and not less than 50 per cent in value of all lands. In such case the plan of dissolution need only show that there is neither indebtedness nor assets. As regards the proposal for the liquidation of indebtedness, no assent on the part of the holders of any evidence of indebtedness barred by any statute of limitations need be obtained. (Id., 712.)

*Bondholders protected.*—The petition is filed with the board of directors who call an election, provided, however, the assent of all known holders of valid indebtedness against the district not barred by the statute shall be obtained, if any there be, and that provision shall be made in the plan presented for the payment of creditors who do not assent. (Id., 713.)

The election must be carried by two-thirds of the votes cast, whereupon the board files in the superior court a petition to determine the validity of the proceedings and of the proposed dissolution plan. This is in the nature of a proceeding in rem and jurisdiction is obtained by publication. Rights of all parties are determined by the court subject to the right of appeal within 30 days after the entry of judgment. Court determines the regularity and the legality of the proceedings. (Id., 713, 714.)



A corporation may be organized for the purpose of acquiring the assets of the district, including the irrigation system, franchises, and water rights. (Id., 714, 715.)

The court has the power to make the orders necessary for the discharge of indebtedness and distribution of property. (Id., 715.)

The amounts of any assessment and the amounts for which delinquent sales have been made are declared to be liens on the lands affected. (Act approved Feb. 10, 1903; L. 1903, 3; Deering's General Laws, 711.)

*Districts of more than 500,000 acres.*—An act providing for districts having an area of more than 500,000 acres is the result of special problems encountered by the Imperial irrigation district in its struggle with the Colorado River. Authority is granted to such districts, of which this district is the sole representative in the State, to expend such sums as the board finds necessary for the protection of the canal system and its lands from damage by flood and the overflow of rivers, and to contribute funds to be expended by or jointly with the United States or other governments or persons benefitted by the same protective works. The board is given the special authority to do all necessary things to insure such irrigation system from such damage without first receiving a petition of the landowners for holding an election. The board may borrow for the purposes named at a rate not exceeding 7 per cent the amount of any authorized bond issue not yet sold, but when the bonds are sold the amount borrowed must be repaid. Added powers are given to borrow for flood protection purposes in any one year not to exceed \$200,000 at a rate not greater than 7 per cent. (Act approved Jan. 21, 1915, L. 1915, 1; Deering's General Laws, 722.)

*"California irrigation act."*—Another act was approved June 4, 1915, known as the California irrigation act (L. 1915, 1173), which with the amendatory act of May 28, 1917 (L. 1917, 1068), provide, among other things, for cooperation between the State of California and the United States. This creates an irrigation board, provides for the formation of irrigation districts and conservation districts and authorizes irrigation districts to reorganize under the act. The board also has authority to consolidate into single districts known as conservation districts, previously existing irrigation, reclamation, and drainage districts and other political subdivisions of the State organized to promote reclamation. The powers are largely vested in the commission, and the public corporations created differ in so many particulars from the ordinary type of irrigation district, which is the subject matter of the present work, that we do not deem it proper, within our necessary limitations, to give a résumé of the provisions of this law. It is, however, a very interesting enactment and valuable as a model and will be found in chapter 646 of the laws of 1917, page 1068. The act was approved May 28, 1917.

#### COLORADO.<sup>1</sup>

The Colorado law will be found in Mills's Annotated Statutes, 1912, secs. 3964 to 4025, inclusive, as amended by the Session laws of 1913, 384; 1915, 298 to 306, and 314 to 318, and 1917, 290 to 315.

<sup>1</sup> See p. 1 for the purpose and scope of this discussion. See also Addenda, p. 166, for 1919 amendments.



There are also several supplementary acts of importance, the citations to which will be found below.

*Petition for organization.*—Organization is initiated by petition to the board of county commissioners by a majority of the owners of land including homestead entrymen within any district, whether they be residents or nonresidents, representing the ownership of a majority of the area of the district. Organization purposes include drainage construction necessary to maintain the irrigability of the district lands. The usual clauses have been inserted as to cooperation with the United States, drainage purposes being expressly mentioned in this connection also. (Sec. 3964, as amended, L. 1917, ch. 83, sec. 1 and sec. 3965.)

*Action by county board.*—Upon the hearing after due notice by the county board, if the petition be dismissed, the grounds for dismissal must be stated in writing, and if not well-founded a writ of mandamus issues to compel action by the board. (Sec. 3966.)

*Organization and other elections.*—Upon the initial election a majority of the legal electors is sufficient for organization. (Sec. 3968.) Before the district, however, is authorized to proceed in the matter of a bond election or the purchase of property, the plans therefor must be submitted to the State engineer and a decision rendered by him upon the feasibility of the project. (Sec. 3967, as amended, L. 1917, ch. 83, sec. 2.) At all elections under the act every owner or entryman of agricultural or horticultural land within the district over 21 years of age, who is a citizen or who has declared his intention to become a citizen of the United States and is a resident of Colorado, who shall have paid real property taxes during the calendar year preceding such election, is entitled to vote. (Sec. 3967, as amended, L. 1917, ch. 83, sec. 2.)

Provision is made that judicial notice shall be taken of the existence of the district, and protecting any district the organization of which has not been questioned in quo warranto proceedings for a year after the order of establishment. (Sec. 3977.)

*Powers of the board.*—The directors are granted about the customary powers. All waters are distributed pro rata except that, during the existence of any contract between any district and the United States, distribution may be made according to the terms of such contract. There is added a proviso that the act shall not be construed to relinquish to the United States any of the sovereign rights of Colorado to the waters within its borders or the exclusive authority of the State over said waters and the diversion, appropriation and use thereof, nor to modify the methods of appropriation thereof. (Sec. 3974, as amended, L. 1917, ch. 83, sec. 3.)

*Indebtedness—limitations.*—The board of directors is denied the power to incur any debt or liability in excess of the provisions of the act in the usual terms, with the additional proviso that the expenditures may be increased in emergency cases if the same be authorized in writing by a number of the district electors equal to one-half the number who voted at the last annual district election. (Sec. 3991, as amended, L. 1915, ch. 108, sec. 1.)

*Bonds—purposes and authorization.*—Bonds in Colorado are authorized by a majority vote of the legal electors who are freeholders and taxpayers or entrymen. Bonds may be for the payment of the first year's interest as well as for construction and acquisition pur-

poses. They run for 20 years and installments of principal are payable from the eleventh to the twentieth years. But by a majority vote bonds may be issued maturing in less than 20 years and provision is made for a supplementary issue to be voted at a special election if the proceeds of the prior bond issue have been exhausted. There is a priority of lien for taxes in accordance with the priority of the bond issue or contract with the United States. (Sec. 3978 as amended L. 1917, ch. 83, sec. 6.) Bonds can not be sold for less than 95 per cent of the par value and interest shall not exceed 6 per cent per annum. (Sec. 3979.)

*Same—how paid.*—Bonds, principal and interest, and obligations to the United States shall be paid by revenue from an annual assessment upon the real property of the district which shall be and remain liable to be assessed for such payments. Public land of the United States are subject to taxation to the extent provided by the Smith Act of August 11, 1916. (Sec. 3980 as amended L. 1917, ch. 83, sec. 7, and see above p. 25 for the Smith Act.)

*Same—confirmation.*—The confirmation proceedings relate not only to the steps to authorize a bond issue and contract with the United States, but also for the determination of the validity of the contract with the United States. (Sec. 4013 as amended L. 1917, ch. 83, sec. 16.) The proceedings in other respects follow the usual course.

*Same—refunding bonds.*—The act approved March 6, 1915, which provides in some detail for the refunding of district bonds, is discussed in the preceding general text, at page 58.

*Construction work.*—The provision for the letting of construction work is about as usual and allows for construction to be undertaken by the board. (Sec. 3986 as amended L. 1917, ch. 83, sec. 12.)

*Revenue—assessments.*—The amounts of money as determined by the board of directors annually required to meet the maintenance, operating, and current expenses, also any deficiency in the payment of expenses theretofore incurred, also to meet any contract with the United States, shall be certified to the board of county commissioners. While the respective amounts payable by tracts in a district formed on a Federal project are required to be fixed in accordance with the Federal laws and notices, orders, and regulations issued thereunder and in compliance with any contracts made by the United States with any owners and in compliance with the contracts between the districts and the United States, it is expressly provided that the obligation of the district contracting with the United States shall be deemed a debt of the entire district. No expenditure to be paid out of such fund shall exceed in any one year the amounts fixed for such expenses in the annual appropriation resolution except as in the act later provided. (Sec. 3981 as amended L. 1917, ch. 83, sec. 8.)

The county assessor must make and enter the assessment of all real estate including public lands subject to assessment under the Smith Act, exclusive of improvements, within an irrigation district in whole or in part lying in such county and make returns of the total amount of such assessment to the county board of the county in which the office of the district is located. All lands within the district for purposes of taxation must be valued at the same rate per acre.

*Control over State lands.*—The Colorado provisions for assessment of State lands have been considered in the general discussions. (See p. 60.)

*Relief from assessment.*—No land shall be taxed for irrigation district purposes which by reason of location or broken, uneven surface, or unfavorable character or soil is unsuitable for irrigation and cultivation or which from any natural cause is not capable of irrigation and cultivation except at a financial loss. If the amount of water available shall be wholly insufficient for the successful raising of crops on the entire district acreage susceptible of irrigation therefrom, the fact may be alleged, and, if proven, shall entitle the owner of lands that have never been cultivated or irrigated to relief by way of exclusion and relief from assessments.

This is accomplished by written petition to the board of directors showing the facts above outlined and also that the petitioner did not participate in the organization of the district. Any court of competent jurisdiction may then review the action of the board of directors on the petition as well as all official action in including such lands in the district and taxing them for district purposes, but any owner who has cultivated and irrigated any part of his land has to that extent waived and relinquished his right to relief under this section.

Where, however, contract has been made with the United States the written consent of the Secretary of the Interior is necessary before the boundaries may be changed or lands exempted from taxation under this section. (Sec. 3982 as amended, L. 1917, ch. 83, sec. 9.)

The section above outlined has a direct tendency to undermine the security of bondholders, and is therefore damaging. The issues have been discussed in the general discussion. (See p. 52.)

The owner applying for the relief described must pay all taxes other than irrigation district taxes and interest, penalties, and fees to the county treasurer. (L. 1915, ch. 106, sec. 2.)

*Levy.*—The county commissioners immediately upon receipt of the returns of the total assessment of the district and the receipt of certificates of the directors certifying the respective total amounts of money required to be raised must fix the rates of levy necessary to provide the respective amounts of money and to certify the same to the county commissioners of each county in which any part of the district may lie. The rate of levy on the assessed valuation shall be increased 15 per cent to cover delinquencies. The county commissioners when making the levy for county purposes must levy also upon all district realty within their respective counties for district purposes. (Sec. 3983 as amended L. 1917, ch. 83, sec. 10.) The county treasurer in which the office of the district is located is ex officio treasurer of the district. (Sec. 3984 as amended L. 1917, ch. 83, sec. 11.)

*Delinquent tax sales.*—The revenue laws of the State for assessment levy and collection of realty taxes for county purposes, except as modified in the district act, including penalties and forfeiture for delinquency, are made applicable for the district taxes. In case of sale where no bids are made the property shall be struck off to the irrigation district, and no taxes assessed against any such land shall be payable until the same shall have been derived by the district from the sale or redemption thereof. The district in proper cases is entitled to a tax deed subject to the equities of a private purchaser, including right of redemption. No action for possession

or to quiet title to land sold for taxes shall lie against the holder of the tax deed unless brought within five years after the delivery of the deed by the treasurer. (Sec. 3985 as amended L. 1915, ch. 109, sec. 1.)

*Warrants.*—The provisions relative to warrants are of the customary type. There is no provision whereby interest on the warrants must stop, unless the warrant is again presented for payment after having been presented and unpaid for want of funds. (Sec. 3987.)

*Issue of bonds to retire warrants.*—When any irrigation district shall have issued warrants for any purpose for which bonds might have been issued, it shall be lawful for the district to issue bonds to retire such warrants after an election of the qualified voters. These bonds may be sold for not less than 95 per cent of the face value and the proceeds applied to the payment of the warrants and accrued interest or the bonds may be exchanged for the warrants at not less than the face value of the bonds. Such bonds shall be subject to all bonds previously issued by the district. (L. 1913, ch. 102, 385.)

*Tolls and charges.*—The usual provision is made for rates of tolls and charges in lieu of assessments for various purposes and for the completion of the plans by assessment in case the proceeds of the bonds are insufficient. (Sec. 3988.)

*Changes in boundaries.*—The annexation and exclusion proceedings require little by way of supplement to the general discussion. Petitions for the inclusion of lands requires the signatures of the holders of all lands to be admitted. (Sec. 3995.) Changes of boundaries of districts require the assent of the Secretary of the Interior where contract has been made with the United States. (Sec. 4008 as amended, L. 1917, ch. 83, sec. 15.)

*Dissolution.*—The dissolution proceedings are contained in the special act of April 12, 1915. (L. 1915, ch. 107, 307 to 313.) Dissolution may be begun by a petition addressed to the board of directors on the part of a majority of the legally qualified electors of the district or by the holders of the legal title to a majority of the acreage or by 75 per cent or more in amount of the holders of the bonds issued by the district. The petition shall set forth the amount of the outstanding bonds and other indebtedness so far as known to the petitioners; also the assets of the district, including the irrigation system and any proposition which has been made by the holders of the indebtedness to settle and any plan proposed to carry the payment into execution. (L. 1915, ch. 107, sec. 2.)

*Same—Consent of creditors.*—An election shall be called upon the question of dissolution and liquidation of the debts and distribution of the assets of the district, the notice of election to set forth the proposed plan, but no such election shall be called until the assent of all holders of valid indebtedness against the district known to the directors shall be obtained or until provision shall be made for the ultimate payment or liquidation of the claims of nonassenting holders. The assent of the Secretary of the Interior where the United States has contracted with the district is a prerequisite to action. (L. 1917, ch. 83, sec. 21, amending L. 1915, sec. 3, 308.)

The majority of the votes cast must favor the dissolution or the proceedings fail. (L. 1915, ch. 107, sec. 4.)

*Same—Judicial confirmation.*—If the election carry, the board must file a petition in the district court to determine the validity of the proceedings and of the proposed plan, the confirmatory proceeding being one in rem, and the court having ample powers to ascertain the validity of the indebtedness and of the procedure. (Id., sec. 4.) From the judgment of the district court writ of error may be sued out within 30 days. (Id., sec. 5.) If the proceedings are not brought by the board, any qualified elector may bring such an action. (Id., sec. 6.)

*Same—Corporation may buy system.*—A corporation may be organized under the general laws of the State for the purpose of acquiring the assets of the irrigation district, including the irrigation system, the water rights, and all the property of the district. (Id., sec. 7.)

*Same—Continued assessment or apportionment of debt.*—The court in its decree shall make the necessary orders to carry the plan for the liquidation of the district's debts into effect, including the right to apportion any indebtedness found due and to declare said portions liens upon the various parcels of land within the district. The decree may require a sale or exchange of the district's assets so as to provide adequate security for the ultimate payment or complete liquidation of all the debts of the district. The court may also provide by decree for the ultimate payment of all or any part of the debts of the district by directing a continuance of the levy and assessment of taxes upon district lands in the same manner as under the irrigation district law. (Id., sec. 8.)

The court shall also have power in such manner as it may deem just under the circumstances to apportion the bonded debt of the district among the various tracts of land, each irrigable acre, however, being liable for the same amount, and to provide for the release and extinguishment of the liens securing the bonds of the district or any part thereof against all or any of said land upon the payment of all or a pro rata amount of the bonded debt by the landowner either in cash or the surrender of an equivalent amount of the district bonds.

*Same—extinguishment of lien.*—As regards any tract upon which the lien is thus released, the treasurer shall issue a certificate evidencing the extinguishment, which when recorded shall be conclusive evidence that the land has been released from the lien securing the bonds. (Id., sec. 9.) This part of the plan we believe to be subject to criticism, and for which the general text under the head "Dissolution" may be consulted. (Supra, p. 86.)

*Same—ultimate liquidation required.*—It is provided, however, that "no plan of liquidation shall be approved by the court which does not provide for the ultimate payment or liquidation of all the indebtedness of the district and adequate security for the holders thereof." (Id., sec. 10.) In case the court shall decree the establishment of a lien against any portion of the lands or property of the district, the decree shall provide for the foreclosure of such liens upon the failure to make any payments, the conditions of foreclosure to be within the discretion of the court. (Id., sec. 11.) After the discharge of all obligations the balance of the money is distributed to the assessment payers. (Id., sec. 12.)

*Districts free from debt.*—Irrigation districts which are free from debt may also be dissolved under this act, in which case the proceedings for dissolution need not be passed upon by the court, but after the holding of an election a certificate shall be filed with the county clerk showing the steps effectuating the dissolution. (Id., sec. 13.)

*Sale of irrigation system.*—Provision by separate enactment and irrespective of dissolution proceedings is made for the sale of the irrigation system, water rights, and other property of irrigation districts. (Act of Apr. 17, 1917, ch. 86, 321-326.) The plan is initiated by resolution of the board of directors submitting the question for vote at a special or general election, the notice of which shall contain the proposed terms and conditions and the plan to be carried out. (Id., sec. 1.) If the election carry, the board may file a petition in the district court to determine the validity of the proceedings. (Id., sec. 3.)

*Same—power of the court.*—At the hearing the court must determine the amount of the indebtedness, the validity of any portion thereof, and may adjust and determine the rights and liabilities of all parties and decree the execution of the proposed plan. Writ of error to the supreme court lies within 90 days. If the board fails to act, any qualified elector may bring the proceeding. (Id., secs. 3 and 4.) The sale of property may be made to any person, to a corporation organized under the Colorado laws, or to the United States, but no sale of water rights shall impair or relinquish any of the sovereign rights of the State to the waters of the State or the authority to control and regulate the diversion, use, and distribution thereof. (Id., sec. 5.) No plan for the sale of the entire property of irrigation districts shall be approved by the court which does not provide for the ultimate payment or liquidation of the debts of the district and give adequate security for the holders thereof as well as protect the landowners of the district. (Id., sec. 6.)

*Same—rights of creditors.*—Any construction of the act to abridge the powers of district officers or the county board or the revenue officers of the State in the assessment, levy, or collection of district taxes, or otherwise, is expressly precluded, as is also any construction which would either impair or enlarge the rights of creditors.

#### IDAHO.<sup>1</sup>

The Idaho law will be found in the Revised Codes of Idaho, 1908, sections 2372 to 2443, inclusive, as amended by laws 1911, pages 102, 194, 414, 435, 461, 587; laws 1913, pages 453, 541; laws 1915, pages 118, 134, 203, 304, 391; laws 1917, pages 313, 478, 493, 497.

*Petition for organization.*—For organization purposes a petition is presented to the county commissioners signed by 50 or a majority of the holders of title, or evidence of title, including entrymen on Federal or State land, representing one-fourth of the total lands of the district which will be assessable. Such lands must be susceptible of irrigation from a common source and by the same system of works. Organization may proceed under the statute when it is the desire of the petitioners to provide for the irrigation of the district

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 167, for 1910 amendments.



lands "or when for other reasons they desire to organize the proposed territory into one district." The petition must state whether it is proposed to purchase irrigation works already in operation or to construct new works. (Secs. 2372 and 2373.)

The statute requires a very full showing as to the engineering requirements in maps and plans attached to the petition and the notice of hearing must outline the proposal as to the plans, whether a new canal system or the purchase of an existing system is proposed.

*Functions of State engineer.*—The petition and accompanying papers must be filed with the State engineer for four weeks, and his report is submitted to the county board at the hearing upon the petition. If the report be against the organization, the county board must refuse further to consider the same unless it be requested in writing by three-fourths of the landowners. The petitioners may amend the plan "to meet the approval of the State engineer or as they may find advisable." After the plans have either been approved by the State engineer or the written request on the part of the required number has been received, the board fixes the boundaries. (Sec. 2374.)

*Elections and electorate.*—An election is held at which a voter must have the qualifications required under the general election laws of the State. The statute adds the requirement that he must be a resident of the proposed district and a holder of title of land in the district. This provision, however, has been declared unconstitutional by the courts. (Sec. 2375 as amended L. 1911, 461, and L. 1915, 136. See the outline of the unconstitutionality of this section, *supra*, p. 19.)

A two-thirds majority of the votes cast is required for organization.

Elections are conducted as nearly as practicable in accordance with the general election laws of the State, the provisions as to the form and distribution of ballots and registration being excepted. Judges of elections are required to propound to every elector and have subscribed an elector's oath which includes the unconstitutional requirements. (Sec. 2376 as amended L. 1911, 461; L. 1915, 134.)

*Same—registration.*—The secretary of the district acts as registrar, performing so far as applicable the duties of registrar under the general-election laws. He receives applications for registration at any time, and only those persons whose names appear upon the poll list of the last preceding annual election, together with those subsequently registered seven days prior to any election, are allowed to vote. (Sec. 2379 as amended L. 1913, 453.) Comment upon the unconstitutionality of this section will be found in the main discussion. (*Supra*, p. 19.)

The provisions of law as regards election details are more complete in the Idaho irrigation district law than in others. (Secs. 2380 to 2384 as amended L. 1915, 205.)

*District officers.*—The number of directors and divisions is three, but with a provision for the changing of the number with an option between three, five, and seven directors upon an election called after a petition signed by 50 per cent of the number of electors voting at the last annual election and representing 25 per cent of the area of lands of the district. If the election results in a change a redivision of the district is necessary in order to correspond. (Sec. 2378-a

as added by L. 1915, 210.) The directors chosen at the organization election appoint a secretary and treasurer. (Sec. 2377 as amended L. 1915, 306.)

Provision is made for an election upon a schedule of salaries and fees after a petition by 50 or a majority of the freeholders within the district. (Sec. 2389.)

*Selection under Carey Act.*—In addition to the customary powers and duties of directors, there is a provision that in case there are lands in condition to be selected under the Carey Act within the district boundaries, the board of directors is authorized to file with the State board of land commissioners a request for the selection of lands to be reclaimed, accompanying the request with a proposal to construct the necessary irrigation works. The proposal is prepared in accordance with the rules of the State board and the regulations of the Department of the Interior and accompanied by certificate of the State engineer that application for appropriation permit has been filed, together with the State engineer's report thereon. (Sec. 2386 as amended, L. 1915, 308.)

*Settlement under the Carey Act.*—Upon the withdrawal of the land by the Department of the Interior the district and the State board may enter into contract for construction of irrigation works, which contract shall include the price and the terms of disposition of land to settlers. The statute then includes provisions for application for entry by qualified persons, imposes requirements as to proof of cultivation and reclamation and for patents. The apportionment of the cost of the irrigation works made by the board of directors and all assessments and taxes levied against the land by the district, where the Carey Act provisions are in effect, are a first and prior lien upon the water right and land under the Idaho statute, the "said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and holder of said land, and said land shall be sold as other lands in the district are sold for like assessments, and the sale of the lands shall work an assignment of the contract to the purchaser." (Secs. 2386-a to 2386-e, as added L. 1911, 196, 468.)

The State laws with reference to the Carey Act lands and requests for selection and the like and the procedure are made to cover applications of an irrigation district where the same are not particularly provided for in the sections last above cited. (Sec. 2386-f, as added by L. 1911, 199.)

*Excess liabilities.*—The usual provision against the incurring of any debt or liability in excess of the express provisions of the act is supplemented with a declaration that for any of the purposes under the act the board before the collection of the first assessment may incur a debt not exceeding \$2,000 and may cause warrants bearing not exceeding 7 per cent to issue therefor. (Sec. 2392.)

*Annual reports and statements.*—Annual report of the condition of the construction work and the success of the district plans and as to the availability of sufficient funds is required to be made to the State engineer, who shall make such suggestions and recommendations to the board as he deems advisable. (Sec. 2393.) The board must also publish an annual financial statement for local publication. (Sec. 2394.) In addition the board of county commissioners is ex-

pressly given access to the district books, records, and vouchers. (Sec. 2395.)

*General plan of operations.*—After organization the directors are required to formulate a general plan including plans and estimates and submit the same to the State engineer, who shall report to the board. The directors shall then determine the amount of money required, and call a special election as to bonds or contract with the United States, as the case may be. The usual notice of election is required to state that the State engineer's report and maps and estimates are open to public inspection by the people. The election requires a two-thirds majority in order to pass. (Sec. 2396, as amended L. 1915, 310.)

*Bonds.*—The bonds if issued run for 20 years, the payment period running from the eleventh to the twentieth years, inclusive. The interest shall not exceed 7 per cent. In case the money raised by the sale of bonds be insufficient for the completion of the works under the plan adopted and additional bonds be not voted, the plan by levy of assessment therefor. After the indebtedness has been authorized by the election the board may enter into contract with the United States and issue bonds or not as called for by the contract. (Sec. 2397, as amended L. 1915, 311.)

If the plan or works have been examined by the Federal Reclamation Service, which has declared that the same are practicable and that there is good security for the payment of principal and interest, such fact is stated in the bonds. If the sale of bonds has been confirmed and approved by the courts, this should appear on the bonds under the seal of court. (L. 1915, 295.)

*Contract with United States.*—The taxing powers of the district must be invoked to repay the United States for moneys expended and secured by district contract. The works constructed under such contract shall be controlled and administered by the district under the Federal laws with the proviso that the board may enter into contract with the United States to operate and maintain the works and may levy assessments for the cost of such operation and maintenance and collect the same as otherwise provided in the district law.

If the district act as fiscal agent of the United States, it is expressly given the right to refuse the delivery of water to persons who have not made the payments and complied with the acts of Congress, the public notices and rules and regulations issued thereunder.

The district is also authorized to contract for the completion of works partially completed and may redeem outstanding bonds with funds advanced by the United States and contract to repay the expenditures. No such contract with the United States shall be binding unless ratified by a two-thirds vote of the district electors. Temporary contract, however, for not to exceed one year for securing a water supply from the United States may be made by the board and payment therefor provided by tolls or an assessment as part of the operation and maintenance costs. (Secs. 2398, as amended, L. 1915, 304, and see L. 1917, p. 298.)

*Assessments.*—In Idaho assessments are made on the basis of benefits, and there is no provision for a reapportionment at any future date or for a readjustment. Whenever the electors have authorized an issue of bonds, the board must examine each tract and determine the benefits which will accrue thereto from the construction or pur-

chase of the works, and the cost shall be distributed over the tracts in proportion to such benefits, "and the amount so apportioned or distributed to each of said tracts or subdivisions shall be and remain the basis for fixing the annual assessments levied against such tracts or subdivisions in carrying out the purposes of this chapter."

The board shall then make a list of apportionments with the amount and rate per acre or may embody the information upon a map. The list or map must be filed in the office of the State engineer by way of copy and "whenever thereafter any assessment is made either in lieu of bonds or any annual assessment for raising the interest on bonds or any portion of the principal, it shall be spread upon the lands in the same proportion as the assessment of benefits, and the whole amount of the assessment of benefits shall equal the amount of bonds or other obligations authorized at the election last above mentioned." (Sec. 2399, as amended, L. 1911, 199, duplicated, 472.)

Notice shall be given to the owners of the meeting to be held for the assessment and apportionment; and it is provided in Idaho (an exceptional clause) that a postal card be mailed or delivered to each landowner and mailed to nonresident landowners with the provision that for the purpose of notifying nonresidents and others whom it is not reasonably practicable to notify by mail, the notice shall be published. The board at the meeting must hear all evidence and classify the land in such manner as to secure an equitable assessment.

Any person who then fails to appear is precluded from contesting except after a special application to the court upon confirmation proceedings showing reasonable excuse for such failure. If an owner objects before the board to the assessment as finally fixed, his objection being overruled, such objection is deemed appealed to the district court to be heard at the confirmation proceedings. (Sec. 2400.)

The secretary of the board is the assessor of the district and must prepare an assessment book.

In case the assessment plan (rather than tolls and charges) is used for the purpose of maintaining and operating the works, the board must annually proceed to levy an assessment on all lands for such purposes. This assessment shall be proportionate to the benefits received growing out of maintenance and operation of the works. The board, after notice, meets as a board of correction and makes such changes as may be found equitable. (Secs. 2407 and 2409 as amended by L. 1911, 194; also sec. 2408.)

The assessments annually become a lien against the land assessed, the liens having priority, as regards the bond issues and contracts with the United States if both are outstanding, in the order of the respective dates. (Sec. 2411 as amended L. 1915, 315.)

The assessments are payable in two installments, and provision is made for special date of delinquency in order to facilitate payment to the United States at a special date named in Federal contracts. (Sec. 2412 as amended L. 1915, 206.)

*Special assessments.*—A special election which must be passed by a two-thirds majority may authorize a special assessment for raising money to be applied to any purposes under the act. The assessment so levied is computed and collected in the same manner as other assessments provided by the act. (Sec. 2391.)

*Drainage.*—Any irrigation district may, whenever necessary, for the benefit of lands actually requiring drainage or for the protection

of other lands within said district, cause drainage canals and works to be constructed. This may be done whether the irrigation works have actually been constructed or acquired or not. To this end the district shall have the same power and authority as it has respecting irrigation. (L. 1917, 74.)

*Confirmation.*—The law for confirmation proceedings in Idaho includes not only the organization and the authorization of bonds, but the proceedings in the matter of the making of assessment list and apportionment. Separate petitions in the various portions of the proceedings may be filed and remaining proceedings undertaken later, but such further proceedings are not to be in the nature of a rehearing of the matter previously decided. (Sec. 2401 as amended L. 1915, 391.)

In the findings of the court the assessment list and apportionment may be corrected to conform to the rights of the parties and a final decree approving and confirming the proceedings may be rendered. (Sec. 2403.)

Irrespective of the confirmatory proceedings above referred to, it is provided that no action shall be commenced or defense made affecting the validity of the organization after two years from the entering of an order organizing the district.

*Bond sales.*—The board is authorized to sell the bonds from time to time in such quantities as may be necessary, and bonds may be deposited with the United States at 90 per cent of their par value, but the board is prohibited from selling the bonds at less than par value and accrued interest. They may be sold without advertisement or after advertisement to the highest bidder. If it is found impossible to sell the bonds or best to withdraw the same from sale, the bonds may be canceled and the board may levy assessments to the amount of the bonds canceled.

Assessments in lieu of canceled bonds are collected in the same manner as assessments levied under the remaining provisions of the act, but such assessments shall not in any one year exceed 10 per cent of the total bond issue authorized by the district unless a greater assessment be authorized by a majority vote. (Sec. 2404, as amended L. 1915, 313.)

In lieu of the sale of bonds and payment for all construction work in cash, bonds may be issued as such payment and delivered directly to the contractor. Maintenance, interest, and power charges may be included in any contract for construction for any period agreed upon not to exceed three years, and when so included the charges may be paid in bonds of the district. (Sec. 2404-a, as added by L. 1913, 541.)

The bonds and interest shall be paid by revenue derived from assessment upon the land of the district, and all of the land in the district shall be and remain liable to be assessed for such payment. After a two-thirds majority of the electors shall vote favorably at a special election the board of directors, as regards any portion of the period from the time that bonds begin to bear interest until five years after water has been used on the district lands, may pay any part of such interest with the proceeds of the sale of coupon bonds to be issued and sold for said purpose in lieu of paying the interest by revenue derived from assessment. The bonds so issued and sold

shall have the same priority of lien as ordinary district bonds. (Secs. 2405 to 2405-c, as amended L. 1915, 118.)

*Delinquent tax sales.*—Irrigation districts are authorized to become purchasers at delinquent tax sales, with the same rights as private purchasers. The lands so acquired may be conveyed by deed by the president or secretary of the board after resolution of the board. (Sec. 2414.) The redemption period is three years from the date of sale. (Sec. 2415, as amended L. 1917, 478.)

*Bids and contract.*—The bids for this work may be rejected and readvertisement for bids issued, but the board is not authorized to undertake any work and use the construction fund therefor except after a petition of 50 or a majority of the landowners of the district. No contract shall be let unless there is sufficient money available for full payment. (Sec. 2416, as amended L. 1915, 315, and 2417.)

*Expenses—How defrayed.*—For organization, operation, management, repair, and improvement purposes the board may either fix rates of tolls and charges for irrigation or may levy assessments or employ both tolls and assessments. In case assessment therefor is made, the procedure, except where otherwise provided, particularly in sections 2407 and 2409, is the same as that relating to the payment on bonds. Special assessments become a lien when they are ordered. Tolls may be made payable in advance. (Sec. 2419, as amended L. 1911, 201.)

Rights of way are dedicated over State lands. (Sec. 2421.)

*Electric-power plants.*—The board is given the power to construct and operate electric-power plants and other requisites for generating and transmitting electric power and for pumping water for irrigation and domestic use or to contract for such purposes. The board may contract for sale of surplus power generated for delivery at the plant or within the district. No such contract shall extend for more than five years, nor until ratified by a majority vote of the electors may it involve more than \$1,000. (Act approved Mar. 8, 1915, 137.)

*Annexation.*—Annexation to a district may be initiated by holders of title representing one-half or more of any body of adjacent lands. If there be objection and an election be held a majority of the votes cast is sufficient for annexation. (Secs. 2423 to 2433.)

*Exclusion.*—Exclusion of lands from any district is provided for in three cases, one of which must be specified in the petition, either that the lands are too high to be watered by the district or that the owners have installed a sufficient system independent of the district for irrigation because of the failure caused by the district not owning a sufficient water right or that the lands are not agricultural or farming lands. (Sec. 2434, as amended L. 1911, 102.)

The lands excluded, however, are not relieved of their obligation to pay their proportionate share already created and existing over any bonded indebtedness of the district, and the lands shall remain a part of the district for the purpose of discharging the bonded debt. No provision is made in this connection for the contract debt to the United States. (Sec. 2436 as amended L. 1911, 103.)

An appeal from the decision of the board denying the petition lies to the district court. (Sec. 2437 as amended L. 1911, 104.)

*Dissolution and modification of boundaries.*—A series of combined provisions for modification of boundaries by way of exclusion of land



and for the dissolution of the district is in force. The proceedings for either form of relief are begun by a petition by 25 or a majority of land owners in the district asking for an election. The petition either shall state that the outstanding bonds, warrants, and other obligations against the district have been fully satisfied and paid or shall set forth reasonable grounds for the belief that the creditors of the district will assent to the proposed modification or dissolution.

At the election, after notice, all persons having the qualifications of electors under the general laws of the State and resident in the district may vote. The election must be carried by a majority of those voting, and thereafter the board must file in the district court a petition that the proceedings be examined and confirmed, setting forth all items of indebtedness of the district, with the name and residence of the creditor.

The proceedings are declared to be in the nature of a suit to quiet title with respect to such district lands as are proposed to be affected. The board is plaintiff and the creditors are parties defendant. If it appears to the court from proof that there is no indebtedness, or if the holders of the outstanding indebtedness have filed no objection to the proceedings or have filed their consent thereto, the court shall enter decree confirming proceedings, describing the lands involved, which thereafter are considered unaffected by any of the matters done by the district while such lands were a part thereof. The election is declared ineffective until the proceedings have been confirmed by a decree of the district court. (Secs. 2437-a to 2437-d, inclusive, added by L. 1917, ch. 167, 497.)

References to the provisions for cooperation between districts under the Idaho law (sec. 2438) are made in the general discussion.

*State lands.*—No State lands included in any district shall be assessed, and the assessment and taxation provisions are expressly declared inapplicable to such lands. (Sec. 2439 as amended L. 1917, 493.)

#### KANSAS.<sup>1</sup>

The irrigation district law of Kansas is by no means as adequate as those of most of the States. The act was passed in 1891 (ch. 133, art. 7), and will be found in the General Statutes of Kansas, 1915 (sec. 5618 to 5641, inclusive, and secs. 5666 to 5673, inclusive), having been little amended since its first enactment. Its provisions do not admit of as general utility for the reclamation of arid or semi-arid lands as those of most States.

*Organization.*—Petition for the formation of a district is addressed to the board of county commissioners and must be signed by not less than three-fifths of the resident landowners of the proposed district. At the election a three-fifths majority of those voting must be secured. (Sec. 5623.)

*Officers.*—The officers of the district consist of a president, secretary and treasurer, who are the board of irrigation commissioners. (Sec. 5624.)

The board is authorized to appoint a superintendent of the district whose salary is prohibited from exceeding \$1,000 annually.

<sup>1</sup> See p. 87 for the purpose and scope of this discussion.

*Bonds.*—The method of issuing bonds is cumbersome since a petition must be addressed to the board of county commissioners (sec. 5627) asking for the calling of an election and this petition must be signed by three-fifths of the resident landowners of the district (sec. 5628). This election, likewise, must pass by three-fifths of the votes cast (sec. 5630) and the district is prohibited from issuing bonds to exceed \$10 per acre in the aggregate, the bonds running for not less than 5 nor more than 30 years (sec. 5626). Another election must be held to authorize the purchase or construction of irrigation works with such bonds if such a step should be undertaken (sec. 5632).

*Distribution of water.*—The board has charge of the distribution of water, being authorized to charge such rates as it may fix, subject to the power of the county commissioners in the fixing of maximum rates for the use of water, and interest shall not exceed 6 per cent per annum. (Sec. 5626.)

*Assessment and levy.*—The sole provision relating to the assessment and levy to be made by the district is the following:

If the quarterly report of said treasurer of said board for June shall disclose to said board of irrigation commissioners that there is not sufficient money in the hands of the treasurer of said board to pay the necessary current expenses, and pay the interest on the bonds of said district, and create a sinking fund for the redemption of the said bonds, then it shall be the duty of said board, and it is hereby authorized and empowered, to levy a tax on all of the real estate dependent upon such works for irrigation in said district to meet the expenditures as in this section specified. (Sec. 5638.)

*Two or more counties involved.*—A separate act was passed in 1901 (ch. 234), providing for the formation of irrigation districts comprising contiguous territory lying in more than one county. In such cases both the petition for formation and that for the holding of an election to vote bonds are required, in contrast with the provisions elsewhere, to be signed by three-fifths of the resident landowners in each respective county as an individual unit. The issuance of bonds must be authorized by three-fifths of the voters of each of the several portions of said district lying in each of said counties at an appropriate election. (Sec. 5666.)

*Criticism.*—It will be noted that the maximum bonded indebtedness is insufficient for general reclamation propositions since a maximum of \$10 per acre is prohibitive in most reclamation enterprises; also the taxing provisions are extremely meager. Moreover, there are no provisions for modification of the boundaries of the district for judicial confirmation nor for cooperation with the United States.

#### MONTANA.<sup>1</sup>

The Montana irrigation district act, approved March 18, 1909, repealed an earlier act, and the law will be found in the session laws for that year, pages 254 to 289, and the amendatory acts constituting chapters 110 and 127 of the Session Laws of 1913, pages 452 and 475 to 479; chapter 145 of the Session Laws of 1915, pages 359 to 377, and chapter 153, Laws of 1917, pages 323 to 337.

The Montana law is unique in providing no elections by the landowners, either for organization or for the authorization of bonds.

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 167, for 1910 amendments.

*Formation.*—Organization in this State is undertaken by petition to the District Court, signed by a majority in the number of the holders of title or evidence of title of the irrigable lands, who must also represent a majority in the acreage thereof. (L. 1917, 323.) Hearing is had upon the petition. (Secs. 2, 3, 4, L. 1909, 255.) Entry men on the public lands of the United States are deemed holders of evidence of title under the act. (L. 1917, 323, 4.)

*Purposes.*—An irrigation district may be formed, not only to provide for irrigation, but also for the construction of works, including drainage, in cooperation with the United States or for the general operation or maintenance of the district. (L. 1917, 323.)

*Lands having prior water rights.*—Lands having prior water rights appurtenant thereto shall not be included in the irrigation district unless each owner shall consent in writing that his lands be thus included. Districts formed to cooperate with the United States, however, may extend their boundaries to include such lands upon petition of the owners of two-thirds only of the acreage of the lands to be included. Moreover, lands with water rights appurtenant served by a system supplying over 10,000 acres may, in the discretion of the court, be included in the proposed district on a petition of at least 65 per cent, both in number and acreage, of the holders of the land having water rights appurtenant thereto and served by the same system of irrigation works. (L. 1917, 331.)

*Hearing on organization petition.*—The hearing before the court is final as to the organization, and is not only announced by publication as in other States, but notice is sent to nonresident holders of title by mail prior to the hearing. (L. 1909, sec. 3.) The method of securing jurisdiction by mailing copies of the petition to nonresidents is also unusual and constitutes a less efficient means of acquiring jurisdiction than that of notice by publication. If it is desired to require notice to nonresidents by mail, a provision such as that in the Oregon statute is preferable and less likely to create a flaw in the proceedings. (See Ore. L. 1917, p. 744.) At the hearing the court may make such changes in the district boundaries as may be deemed advisable, excluding lands which in his judgment will not be benefited by the system. (L. 1917, 324.)

*Finding of court conclusive.*—The court's finding is declared to be conclusive upon all the owners within the district that they have assented to and accepted the provisions of the act unless appeal be made to the Supreme Court within 60 days after the entry of the order. (L. 1917, 326.)

*Board of commissioners.*—The management of the district is entrusted to a board of commissioners. The first board, which in most instances would be charged with the principal constructive duties, is appointed by the court. (L. 1917, 326.) Thereafter it is elected by the people. (L. 1913, 264.)

*Construction work.*—The board is precluded from having construction work in excess of \$5,000 done by the district, being required by law to let contracts for all the larger work. This does not apply to work done in cooperation with the United States. (L. 1915, 367.)

Prior to undertaking the construction of the irrigation system the engineering plans are required by the Montana law to be prepared in full detail for submission to the board of commissioners. After the board arrives at a determination of the amount necessary to be

raised, notices of such determination are required to be given by letter to all persons or corporations holding title or evidence of title to lands within said district at their last known post-office address. (L. 1917, 329, 30.)

*Contract with the United States.*—Contract with the United States is authorized for the construction, operation, and maintenance of works necessary for the delivery and distribution of water therefrom under the provisions of the Federal reclamation act and all acts amendatory thereof or supplemental thereto, and the rules and regulations established thereunder, or for a water supply under any act of Congress permitting such contract. The board is also authorized to become a fiscal agent for the United States under the reclamation act. (L. 1915, 360.)

*Qualifications of electors.*—Persons holding title or evidence of title to land within the district are entitled to vote at elections if qualified as electors under the general and school laws of the State, or if guardians, executors, administrators, or trustees residing in the State, or if domestic corporations (in which case they shall vote by their duly authorized agents). An elector is entitled to cast one vote for each 40 acres of land or major portion thereof owned by him within the district. Any elector, however, owning 20 acres or less is entitled to vote. (L. 1909, sec. 19.)

*Nominations.*—Provision for the filing of nominations on the part of five electors is made with the express proviso that no elector is disqualified from voting for any qualified person, whether the name appears upon the official ballot or not. (L. 1909, sec. 20.)

*Change of boundaries.*—The provisions for a change of boundaries are coupled with a declaration that such change shall not impair or discharge any contract, obligation, lien, or charge for or upon which the district was or might become liable had such change not been made. (L. 1909, sec. 23.)

The petition for inclusion of additional lands need not be signed by the holders of all lands proposing to be admitted, but only by signers representing not less than two-thirds of the acreage thereof. (Sec. 24 of L. 1909, as amended by L. 1915, 363.)

It is provided that where contract has been entered into between the United States and the district no such order shall be rendered until the assent of the Secretary of the Interior, in writing, be filed. (L. 1909, sec. 24 as amended by L. 1915, 366.)

*Change in assessable area.*—Novel provision is made in Montana relative to lands included within the boundaries of districts where the irrigable acreage is fixed at a greater area than actually exists. The owner of such lands desiring a reduction may petition the court to have the area adjudicated, the statute prescribing in detail what must be set forth therein. (L. 1915, 364.) A decree is finally rendered after publication determining the irrigable acreage and upon such decree future assessments are based and past assessments are adjusted in favor of the landowner should the decree lessen the supposed irrigable area. Such decree is forever conclusive upon the parties (Id. 366).

*Lease of irrigation system.*—The commissioners may lease in whole or in part the irrigation system or the water supply of the district provided a majority in number and acreage of the district owners

file their written consent to the making of such lease. (L. 1909, 272.)

*Water rights and apportionment.*—The water is appurtenant to the land, the owner, however, having the right to assign the use thereof for one season in so far as not required on his own land. (L. 1909, sec. 32 as amended by L. 1915, 368.) In the event of a shortage the supply throughout the district is reduced proportionately except that where the right to the use of water is secured in accordance with the Federal laws the apportionment is made in compliance therewith. (L. 1909, sec. 33, as amended by L. 1915, 368.)

*Substitution of water.*—Owners of lands, whether within the district or not, already entitled to water may arrange by contract with the district for the substitution or exchange of water, retaining by statute the privilege of resuming their former water right whenever the receipt of the substituted water shall be prevented. (L. 1909, sec. 36 as amended by L. 1915, 369.)

*Irrigated lands exempt from charges.*—Except by consent of the owner, district lands already under irrigation can not be taxed for the costs of construction or for interest or principal of bonds but only for operation and maintenance. (L. 1909, sec. 37, as amended by L. 1915, 369.)

*Limitations on indebtedness.*—Amendment of the usual provision prohibiting the incurring of debts in excess of the express provisions of law has been made in Montana in favor of organization expenses, surveys, plans, data, etc., and in case of repairs occasioned by unforeseen contingencies. In such case an additional indebtedness is authorized by the Session Laws of 1913. Two acts were in the same year enacted. One permits an indebtedness aggregating one-half dollar per acre. (L. 1913, 452, approved Mar. 17, 1913.) A later act, however, permits an indebtedness of one dollar per acre. (L. 1913, 475, approved Mar. 18, 1913.)

*Bonds—issue.*—Bonds are authorized by petition of the landowners instead of by election, as elsewhere. The petition requires the signatures of a majority in number and acreage of the holders of title or evidence of title and is addressed to the board of commissioners, specifying the general tenor of the bonds. Upon the filing of such petition for bonds, the board shall direct their issuance and provide for an assessment. Similarly an indebtedness in lieu of bonds by contract with the United States is authorized by petition. Petition for authority to issue bonds is required to "specify the rate of interest thereon." (L. 1909, sec. 40, amended by L. 1917, 332.)

*Bonds—confirmation.*—Within 10 days after directing the issuance of bonds, the board must petition the district court to determine the validity of the proceedings relative to the bonds and assessments. After due notice, hearing is had upon the petition, at which time any person interested may appear and contest the proceedings, and appeal from an adverse decision. The decree of the district court (unless appealed from) is forever conclusive upon the world as to the validity of the bonds and assessments. (L. 1909, 276.)

*Same—maturity.*—Bonds may be made to mature serially or not, in the discretion of the board, but shall not run for more than 30 years from the date of issuance. (L. 1909, 279.)

*Same—registration.*—The board may, if it desires, provide for the registration of bonds. (L. 1909, 280.)



*Lien of bonds.*—Bonds so issued, and all amounts to be paid to the United States under any contract, shall be a lien upon all the lands originally or at any time included in the district for whose benefit the district was organized or for whose benefit the contract with the United States was made. This does not include lands merely exchanging water within the district, heretofore mentioned. (L. 1917, 333.)

*Assessment.*—The debt shall be apportioned upon each 40-acre tract, and every separately owned subdivision thereof, by dividing the total principal of the indebtedness by the number of acres of land within said district actually irrigable from its system of works, and every acre of said land shall bear and be assessed for its equal proportion thereof and the interest accruing upon such proportion thereof. An owner may, at the time of annual tax payment, discharge his lands from the lien, both as to principal and interest, by paying in full the total sums assessed against his lands with interest thereon to the end of the year in which payment is made. Such payment shall be applied by the district to the retirement of the bonds, if possible; otherwise, the money shall be placed in a sinking fund and invested as provided by law. (L. 1917, 335.) These provisions for apportionment of the debt and discharge of the land from obligation were injected into the Montana law in 1917.

The apportionment and discharge provisions above outlined are believed to be subject to serious objection from the standpoint of the security of the creditors of the district and criticism of it is offered in the general discussion. (See page 57.)

*Equalization.*—Provision is made for the equalization of the apportionment and assessment at the hearing on confirmation in the district court, at which time a dissatisfied owner may appear and object. Any district formed before the passage of 1917 act may avail itself of it, with the consent of the owners and all holders of the bonds of the district. (L. 1917, 335.)

Where lands are added after the construction of the irrigation works, they are charged with such proportion of the indebtedness for such works as the district court shall decide, and the total indebtedness reapportioned over the entire area of the district. (L. 1917, 335, 336.)

*Annual levy.*—Levy for general expenses is made each year and charged against the lands in the manner outlined above and with a similar provision for the discharge of individual tracts of land from lien by payment. (L. 1915, 374.)

*Funds for payment of bonds.*—When more than one series of bonds shall have been issued by a district, the funds for the payment of each series shall be kept separate and distinct. (L. 1909, 284.)

*Collections and disbursements.*—The county treasurer shall collect assessments of the district at the same time and in the same manner as county and State taxes (L. 1909, 284), and shall be the custodian of the district funds, disbursing the same upon orders signed by the president and secretary of the district board, except as to payments on bonds and interest and under contract with the United States, in which cases no order shall be necessary. (L. 1915, 375.)

The district moneys shall be properly divided into separate funds, and the county treasurer is liable upon his official bond for the safe keeping and proper disbursement of such funds. (L. 1915, 376.)



*Delinquent tax sales.*—Sales of land for unpaid taxes and assessments shall be made in the same manner as for State and county taxes, the right of redemption likewise being identical. There is no provision for the district to purchase such lands at tax sale, but when they are struck off to the county, the county treasurer is required to give to the district a debenture certificate for the amount of the taxes and interest due to the district. This certificate draws interest at the rate of 1 per cent a month, and may be negotiated by the district. When sold the lien of the district vests in the purchaser until the tax is collected and the certificate paid. (L. 1913, 476, 477, 478.)

*Liability of district officers.*—In addition to liability upon their bonds, officers guilty of violation of duty are subject to removal from office by the district court as the result of proceedings instituted for that purpose by any taxpayer of the district. (L. 1909, 286.)

*Right of way.*—The right of way over State lands is expressly granted. (L. 1909, 270.)

*District bonds as investments.*—The law prescribing the authorized investments for insurance companies of Montana is amended to include the bonds of any irrigation district organized under the laws of the State among the lawful investments. (L. 1913, 24.)

#### NEBRASKA.<sup>1</sup>

The Nebraska irrigation district law will be found in the Revised Statutes of 1913, sections 3457 to 3528, inclusive, as amended or enlarged by chapters 68, 69, 205, laws 1915, and chapters 8, 80, 81, 82, 83, 84, 190, 191, 192, 193, 195, 197, laws 1917.

*Petition for formation.*—The petition for organization must be signed by a majority of the electors who own lands or hold leasehold estates or who are entrymen of Government lands. The electorate includes residents of Nebraska owning not less than 10 acres, entrymen of Government land within the district or residents of Nebraska holding leasehold estates to not less than 40 acres of State land within the district, such estates to continue for a period of not less than five years from the date when the elector seeks to exercise the franchise. The land included must be susceptible of one mode of irrigation from a common source and by the same system of works.

The provision is added that where waterways have been constructed before the passage of the act having sufficient capacity to water the land thereunder for which water has been appropriated, the waterways and franchises and the land thereunder shall be exempt from the operation of the law unless the district be formed to purchase such waterways and franchises. (Sec. 3457, as amended L. 1917, 187.)

*Irrigation plan.*—More than usually elaborate requirements are imposed with regard to the submission of engineering details with the petition. The petition must be filed with the State board of irrigation for four weeks before the hearing, and the secretary of such board must examine and report to the county board for the hearing. The board may then amend such plan of irrigation before calling the election. The number of divisions and directors may be submitted to the electorate so as to provide for any multiple of three divisions

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 168, for 1919 amendments.

and directors if so voted. One-third of the directors retire each year. An election upon a proposed change in the number of directors is called upon a petition by 20 per cent of the electors. (Sec. 3458, as amended L. 1917, 191.)

*Organization election.*—The organization election is conducted in accordance with the general laws of the State and a majority of the votes cast is sufficient. (Sec. 3459.)

*Officers.*—The officers, in addition to the directors, consist of an assessor and a treasurer who are elected by the voters of the district. (Sec. 3460, as amended L. 1915, 170.)

*Distribution of water.*—Water is apportioned ratably upon the basis of the ratio which the last assessment bears to the whole sum assessed upon the district. The water right attaches to and follows the tract to which it is apportioned under lease or sale. The board, however, is authorized by by-law to provide for the suspension of water delivery to any land upon which irrigation taxes levied shall remain due and unpaid for two years. (Sec. 3465 as amended, L. 1917, 194.)

*Transfer of water right.*—If any tract of land to which a water right attaches shall become subirrigated so that water is no longer of benefit for irrigation purposes, the owner may apply to the board to exclude such lands from the district, releasing all claim to a water right upon such land and applying for a permit to transfer his right to any other land upon which it may be profitably used. He must apply to have such new tract included within the boundaries of the district and the tract formerly entitled to water excluded. The order of exclusion and inclusion and the transfer may then be made. A certified copy of the order is filed with the register of deeds.

This section must not be construed to authorize the board to include any tract unless the owner obligate the same to pay the same rate per acre as all other lands have originally paid or have been obligated for in the matter of construction costs. The board must make all necessary arrangements for lateral rights of way from the main canal to every tract of land subject to assessment (Id.)

*Status of district property.*—After the customary provision that the district holds all property in trust for uses under the act, provision is made that the board may convey property in whole or in part to the United States in trust or to any trustee for any period not exceeding 30 years, when authorized to do so by the affirmative vote of a majority of the qualified electors voting on the proposition after notice as outlined in the section. (Sec. 3467 as amended L. 1917, 196.)

All of the engineering work must be done under the direction of a competent irrigation engineer and certified by him. The board must submit a copy of the engineering report to the secretary of the State board of irrigation, highways, and drainage, who must file a report with the board containing such matters as the secretary of the State board may deem desirable. (Sec. 3469.)

*Annual report.*—Provision is made for an annual report by the board of directors to the secretary of the State board of irrigation in regard to construction work, plan of irrigation, etc. The statute provides for the secretary making suggestions and recommendations to the district board as he may deem for the best interest of the district. (Sec. 3469.)

*Bonds.*—The directors then determine the amount of money necessary and call an election upon an issue of bonds, the said issue not to exceed the actual estimated cost of construction and purchase, together with the first year's interest upon the bonds. Bonds run for 20 years, installments upon the principal being payable from the eleventh to the twentieth years, inclusive, with the proviso that by a majority vote the bonds may be so drawn as to mature in any number of years less than 20.

It may also be provided by a majority vote that payment be made of interest at a rate not exceeding 6 per cent on all due and unpaid interest coupons attached to valid outstanding bonds, whether previously or subsequently issued and sold, from the date of registration of such coupons for payment, or, if previously registered, from the date of the election to pay such interest, until paid. (Sec. 3469.)

Bonds can not be sold for less than 95 per cent of the face value. (Sec. 3470.)

The date of maturity of any outstanding issue of bonds may be extended for any period not exceeding 40 years by contract with the holders thereof; or refunding bonds may be issued to bear not exceeding 6 per cent interest and to mature in not exceeding 40 years. (L. 1917, 463.)

*Assessment.*—The bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district and all real property of the district shall be and remain liable to be assessed for such payments and for payments due the United States under any contract. (Sec. 3471 as amended, L. 1915, 175.)

The assessor must assess all real property of the district at its full cash value less the value of all improvements thereon. He shall also assess all leasehold estates in State lands at the full cash value thereof less all improvements. City and town lots within irrigation districts which are used exclusively for purposes other than agricultural are not to be assessed or taxed so long as so used. (Sec. 3472 as amended, L. 1917, 188.)

*Equalization and levy.*—The board of directors meets as a board of equalization. (Sec. 3473.) Thereafter the board levies an assessment sufficient to raise the annual interest and principal and all payments to become due to the United States during the ensuing year which, when collected, go into the bond and United States contract fund. In addition the board, if it deems necessary, may levy an assessment for care and maintenance of the works, salaries, and general expenses to go into the general fund.

The secretary must compute and enter in the assessment books the respective sums to be paid on the property and shall certify to the county clerk of the county where the land is located the amount of taxes in each fund levied upon each tract, and the county clerk must enter the amount of each fund in separate columns on the tax list. (Sec. 3475 as amended, L. 1915, 175.)

*Collection of taxes.*—All tax lists when delivered to the county and township treasurers shall contain all irrigation district taxes levied on each tract and the general fund tax shall be collected by the county and township treasurers in the same time and manner as other taxes are collected. The taxes are payable to the county treasurer in the same manner and at the same time as county taxes are paid (Id.).

*Result of failure to assess.*—In case of the neglect or refusal of the board of directors to have the assessment and levy made for the payment of bonds and all payments under contract obligations to the United States, then the assessment of the property for county purposes after equalization shall become the basis for the district assessment and the county board shall cause an assessment roll of the district to be prepared and make the necessary levy. (Sec. 3475, as amended, L. 1915, 175.)

*Limits upon warrant issue.*—Districts are prohibited from issuing warrants in any year exceeding 90 per cent of the levy for said year with the proviso that in case of due and outstanding obligations contracted prior to the year in which any levy is made, the district board shall have power to make an additional levy, not to exceed 2 mills on the dollar assessed valuation, to create a special fund for the payment of past obligations. (Sec. 3476.)

*Delinquent taxes.*—All assessments draw interest at 10 per cent from the 1st day of May of the year following that in which assessment is made until the assessments are paid or the property sold for the payment thereof. County and township treasurers collect assessments in the same manner as other taxes against real estate are collected and the revenue laws of the State for collection and sale are made applicable to the district taxes. The district may become a purchaser at tax sale at its option. Leaseholds in State lands can be sold for delinquency. (Sec. 3477, as amended, L. 1915, 178; L. 1917, 292.)

*Refund of taxes.*—When any person pays an assessment under protest, no refund can be made unless he is able to show by affidavit either that the assessment is levied upon lands outside of the district, that the title to the lands is in the State, that the lands could not be benefited by irrigation either on account of subirrigation or on account of being city or town lots used exclusively for purposes other than agriculture or grazing, or that the lands are not susceptible of irrigation from the district canal. (Sec. 3478, as amended, L. 1917, 189.)

*Federal public lands.*—Where the title is in the United States the lands may still be assessed so far as amenable under the provisions of the act of August 11, 1916. (Sec. 3478, as amended, L. 1917, 189 and 471.)

*Construction of works.*—Provision is made for building the works out of the construction fund or by the use of bonds at their par value after advertisement for sale and no bids being received at 95 per cent or upward of their face value. Additional bonds, having a subsequent lien, may be voted in case the original issue prove insufficient to complete the plans; but in lieu of additional bonds the directors may complete the system by the levy of an assessment. (Sec. 3482, as amended, L. 1915; 180.)

*Running expenses.*—Rates of tolls and charges may be employed to defray the organization, operation, management, repair and improvement expenses in lieu of the assessment plan, or a combined method of tolls and assessments may be employed. If, after the annual assessment, the funds provided for the current year on account of unforeseen contingencies, are found to be insufficient for the proper maintenance and operation of the district, the board is granted the

power to borrow additional funds, not to exceed 50 cents per acre for district lands, pledging the credit of the district for the same. The amount so borrowed shall be included in the estimate for the levy of the ensuing year for the general fund. (Sec. 3482, as amended, L. 1915, 180.)

*Special assessments.*—A majority of the votes cast at an election called to pass upon special assessments is necessary for their authorization. The rate of assessment is ascertained by deducting 15 per cent for anticipated delinquencies from the aggregate assessed value of the property in the district as shown on the assessment roll for the current year, and then dividing the sum by the remainder of such aggregate assessed value. This assessment is collected in the same manner as others, the revenue laws being made applicable. (Sec. 3486.)

*Priority of obligations.*—The lien for the bonds of any series is a preferred lien to that of any subsequent series and any contract obligation to the United States has a preference over bonds subsequently issued. (Sec. 3477 as amended L. 1915, 178.)

*Drainage.*—The usual provision prohibiting unauthorized debts is followed by the proviso that any district shall have the power to and it shall be its duty to provide for the proper drainage of all district lands which have been subirrigated by reason of the lawful use of water from the district canal by the owner or lessee of the lands subirrigated, or from any cause not the fault or by the consent of such owner, and for such purpose the district shall have authority to levy special assessments or otherwise provide funds necessary properly to drain such lands. It may conduct the drainage water to other lands upon which the same may be lawfully used or return it to the stream from which its canal is taken. The powers granted include that of entering into a contract with the United States for drainage of district lands. (Sec. 3487 as amended L. 1915, 181.)

*Change of boundaries.*—The boundaries may be modified subject to the requirement that the change shall not affect the status of the district or impair any obligation, lien or charge. (Sec. 3491.)

*Inclusion of land.*—A petition for the inclusion of additional land may be signed by holders of title representing one-half or more of contiguous body of lands adjacent to the district. (Sec. 3492.) In case contract has been made with the United States no change shall be made in the boundaries unless the Secretary of the Interior shall consent. (Sec. 3498 as amended by L. 1915, 181.)

If an election is held after objections made a majority is sufficient to authorize the annexation. (Sec. 3499.)

*Exclusion of lands.*—The exclusion provisions contain clauses that no land shall be held or taxed by any district which can not from any natural cause be irrigated thereby. (Sec. 3506.) If the assent of the bondholders, or that of the Secretary of the Interior where contract with the United States has been made, is not given, the board must dismiss the petition for exclusion. (Sec. 3508 as amended by L. 1915, 182.) Where there is an objection by some other interested party, and an election results, a majority of the votes cast is sufficient. (Sec. 3510.)

*Confirmation.*—Confirmation proceedings of the usual type are required before the issuance and sale of any bonds (sec. 3515); but

are optional in case of any contract with the United States. (L. 1917, 466.)

*Registration of bonds.*—After the decree is secured, following the usual provisions of law the board must prepare a written statement of the proceedings from the beginning, including the decree, certify the same under oath, and file it with the auditor of public accounts. The latter officer then examines the statements and the bonds, and if satisfied that the law has been complied with he must record the statement and register the bonds. No bonds shall be issued or valid unless they are so registered and indorsed by the auditor's certificate showing that they are issued pursuant to law and are in all respects in due form.

*Bonds are investments.*—The board of educational land and school funds is authorized to invest so much of the perpetual school funds of the State as may be deemed expedient in irrigation district bonds so registered.

Registration is optional as to bonds theretofore issued or those being issued when the amendatory provision was made. (Sec. 3519, as amended L. 1917, 63.)

*Water supply.*—Districts may go outside of the State for their water supply and are authorized to make the necessary contracts to secure a supply from other States. (Sec. 3520.) If a contract for the water supply provides for the payment of the entire purchase price within one year from the making of contract, a resolution shall be passed and the purchase price must be provided for at the same time as the levy for other taxes. (L. 1915, 441.)

If the contract provides for payment to be extended for a period more than a year, the board must receive authority at an election at which the majority of votes cast shall be favorable. Thereafter a tax must be levied sufficient to pay the amounts which become due. (L. 1915, 442.)

Any irrigation district which shall have purchased a water supply and issued bonds may arrange for the surrender and rescission of the contract upon the surrender and cancellation of bonds in an amount equal to the bonds issued in payment for such water supply, and if the water supply was included in the purchase price of an irrigation system the board may arrange for the surrender and rescission of the contract on the cancellation of bonds equal to the part of the purchase price which was represented by the value of such contract for water supply. (L. 1915, 442.)

*Contract with United States.*—Any irrigation or drainage district is empowered to enter into contract with the United States whereby the bonds of the district are guaranteed by the United States or financial credit is extended to the district and for the sale, purchase, or use of irrigation or drainage systems or other property owned or to be acquired for the use of such district and may borrow money to meet any contractual obligation to the United States. (L. 1915, 461; L. 1917, 467.)

Provision is also made for full cooperation with the United States under the reclamation laws. (L. 1917, 464.)

Any irrigation or drainage district may accept the provisions of any act of Congress applicable to such district and obligate itself to comply with such laws, and such rules and regulations as may be



promulgated by any department of the United States in pursuance of such acts. The district shall then be governed by the laws of the State relating to irrigation and drainage districts except in such things as may be otherwise provided for such districts. This act shall not limit the rights which any district has to purchase a water supply or otherwise to contract. (L. 1915, 461.)

*Dissolution.*—Discontinuance of an irrigation district may be initiated by petition to the board of directors by a majority of the assessment payers representing a majority of the acreage of irrigable land. If upon an election a majority is for discontinuance, the board may proceed to adjust, settle, and compromise all indebtedness of whatever form.

*Same—Sale of property.*—The board is authorized to sell the canal franchises and property at not less than a valuation to be fixed by a board of three appraisers, one of which shall be named by the board of directors, one by the county board, and these two appraisers shall appoint a third. The appraisers report in writing to the board of directors, and the property is advertised as may seem to be for the best interests of the district. If the bids are rejected by the board, the property may be sold after private negotiations and the purchase price may be paid part in cash and part in deferred payments, bearing the same interest as the bonded indebtedness of the district, if any. After sale of the property the board shall make a settlement, payment, and redemption, if possible, of all outstanding bonded and other indebtedness of the district, but shall in no case pay more than the market value<sup>1</sup> of such outstanding bonds with interest up to the time of payment, and, in cases where bonds not yet due can not be redeemed by reason of the refusal of the owners to surrender them before due, the board may invest the surplus money, after paying all debts that can be paid, in State, county, or other safe bonds bearing the same or greater rate of interest, if possible, than the district bonds outstanding.

*Same—Continued assessment.*—If the amount realized from the sale of the district property, together with other money of the district, is insufficient for the payment of all the debts, assessments shall continue to be made against the lands included in the district in the manner provided by law for assessments to pay bonds or other debts of irrigation districts until enough is raised fully to pay all obligations. In cases where bonds and other obligations of irrigation districts shall be issued after the passage of the act, they shall be subject to redemption by the board of directors of such irrigation district as soon as its property and franchise shall be sold after such district has elected to discontinue.

After disposition of the property shall have been made and all obligations paid, the report of the board shall be filed in the office of the State board of irrigation, and if any person or corporation have any claim against such district not settled or disposed of and shall neglect to bring suit within five years from the time of the filing of such report, such claim shall be forever barred. (Sec. 3521.)

No express provision is made in the discontinuance statute for the assent of the United States where Federal contract has been made.

<sup>1</sup> Criticism of this provision will be found in the general discussion. (P. 86.)

NEVADA.<sup>1</sup>

The irrigation district law in Nevada was approved March 20, 1911, and is to be found in the Revised Laws of Nevada, 1912 (secs. 4723 to 4791, inclusive). This was amended by the act of March 29, 1915 (L. 1915, ch. 278, 434) and by the act of March 22, 1917 (L. 1917, ch. 150, 255).

*Purposes.*—The act authorizes organization not only for irrigation, but also for drainage purposes, and for cooperation with the Federal Government.

*Petition.*—Organization is initiated by petition to the county commissioners signed by a majority of the landowners, who must represent at least one-half of the total area of the district. Signers must be holders of title or evidence of title to not less than five acres of irrigable land, entrymen upon public lands of the United States, or the State, however, being qualified, the former only pursuant to the act of Congress of August 11, 1916. (L. 1917, 255.)

In case the county board shall deny or dismiss the petition upon insufficient reasons, a writ of mandamus issuing out of the district court is the remedy expressly stated. If allowed by the county board an election is ordered. (L. 1917, 256.)

*Electors and elections.*—Male and female persons of the age of 21 or more, whether resident of the district or not, if bona fide holders of title as defined in section 1 to land situated in the district, are each entitled to one vote at any election except upon a bond issue or contract with the United States, or other election to authorize indebtedness. In the latter class of elections each qualified voter may cast one vote for each dollar, or major fraction thereof, of benefit or assessment apportioned to his land, and at such elections a member of the election board shall indorse on the ballot the number of votes to which the elector is entitled. (Id. 257.)

This provision placing the control of irrigation districts upon the dollar basis is not as democratic as other States have deemed desirable. As a matter of results the small American home owner has been found to be as wise and as conservative a voter in the affairs of public corporations as is necessary for the conduct of their affairs, and perhaps he is fully as public-spirited as the owners of large estates who, under the Nevada law, are given the great voting power.

Guardians, executors, and administrators are authorized, without mention of court order in the premises, to sign petitions, vote, and otherwise exercise the rights of individual owners. Corporations and partnerships holding land are also considered as persons entitled to all rights of natural persons, and the president of the corporation or other person duly authorized by him may sign any petition or cast any vote on behalf of the corporation at a district election. (L. 1917, 271.)

The organization election requires a majority only of the votes cast. (L. 1917, 258.)

Registration prior to voting is required, the laws of Nevada being almost unique in this respect. (L. 1917, sec. 5, 260.)

*Officers.*—The officers of the district, in addition to the directors, are a president, elected from the district board, and a secretary and a

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 168, for changes made by substitute act passed in 1919.

treasurer appointed by the board and holding office during its pleasure (L. 1915, 437); also the secretary exercises the functions of assessor (Rev. L. 4755).

*Local improvement provisions.*—The important local improvement provisions of the Nevada law will be found outlined in the general discussion (p. 76).

*Limitations on indebtedness.*—To the usual prohibition against the incurring of debts in excess of the express provisions of law is added a provision for the incurring of a limited liability for organization, and, furthermore, an annual tax of 3 cents per acre may be levied for the ordinary and current expenses of the district. (L. 1915, 439.)

*Plan of operations.*—It is the duty of the board of directors to formulate a general plan of operations, including proposed construction work, calling an election upon a bond issue or contract with the United States. A two-thirds majority of the votes cast is required to approve the plan. (L. 1917, 266-267.)

*Assessments.*—All the land in the district remains liable to be assessed for payments upon the bonds or on contract with the United States. (L. 1915, 442.)

Assessments are based upon an apportionment of benefits and are determined once and for all after the Idaho plan. Prior to any election upon a bond issue or contract with the United States the board is required to examine each tract and determine the benefits which will accrue from the construction or purchase of the works, and the costs shall be apportioned over the land in proportion to such benefits and "the amounts so apportioned or distributed to each of said tracts or subdivisions shall be and remain the basis for fixing the annual assessments levied against such tracts or subdivisions in carrying out the purposes of this act."

Where contract is made with the United States to provide for the release of liens to the United States, the benefits are apportioned according to the amount of the obligation released, but if any lands shall not be released from any lien, then the benefits shall be apportioned as they accrue in accordance with the Federal acts of Congress and public notices, regulations, and contracts between the district and the United States.

Copy of a list of apportionment or map showing the same must be filed in the office of the State engineer, another copy is retained in the office of the board, and notice that the apportionment of benefits is open for inspection is given by newspaper publication in the county. Such apportionment of benefits shall be used also when special assessments shall be voted by the electors or in the case of annual assessments for interest, principal, or maintenance purposes. (L. 1917, 269, 270.)

The board of directors is constituted a board of correction of assessments. (Revised Laws, sec. 4757.)

*Confirmation.*—The confirmation proceedings have been broadened by the legislature of this State so that a decree confirming the assessment, list, apportionment, and distribution above referred to may be rendered upon the usual procedure. The court is empowered to correct errors in the assessment and apportionment and to render a final decree approving the proceedings. (L. 1917, 270-271.)

*Reports and statements.*—Report to the State engineer upon the progress of the construction and reclamation work is required to be made annually by the district board (Revised Laws, sec. 4742), and a financial statement is required to be published annually showing all liabilities and assets of the district. (Id. 4743.)

*Bonds.*—The board may sell bonds from time to time as may be necessary, with or without advertising, but may not in any event sell them for less than their par value and accrued interest. If the bonds can not be sold at par the board may cancel same and levy assessments to the amount of the bonds canceled, the revenue derived from such assessments to be applied to the same purposes for which the bonds were issued. (Revised Laws, sec. 4752.)

In case the money raised by the sale of bonds be found insufficient to complete the plans and additional bonds be not voted, the board shall provide for the completion of the plan by levy or assessment therefor. (L. 1917, 268.)

*Levy and collection.*—An annual levy is made by the board of directors in accordance with the approved list and apportionment of benefits. (L. 1915, 442, 443.) The secretary of the board certifies the assessment to the county auditor, who enters the same in the tax rolls of the county. The county treasurer collects the taxes in the same manner, under the same penalties that other taxes are collected. (L. 1915, 443.)

*Delinquent tax sale.*—Authority is given to the treasurer, in case there are no bidders for certain tracts at a delinquent sale, to buy the same in the name of the district; and such treasurer shall take certificates of sale or deeds as other private buyers and subject to the same redemption, fees, and other provisions of law relating thereto. Such property is required to be held, treated, and disposed of in accordance with the laws relating to similar cases in which counties purchase property. (L. 1915, 447.)

*Construction contracts.*—The usual provisions for advertisement and letting of construction contracts obtain. But no contract of any kind shall be let by the board unless money is on hand for payment in full for the work or material contracted. This does not apply to contracts with the United States. (L. 1915, 444.)

*Organization and maintenance expenses.*—The board may fix charges for water or levy assessments for organization and maintenance purposes, or do both. All charges and assessments are listed in the regular assessment book and collected by the treasurer like regular annual assessments. The board may order tolls for water, to be collected in advance. (Revised Laws, 4767.)

*Annexation.*—The provisions for changing the boundaries by way of annexation permit the petition to be signed by one-half or more of the owners of the land proposed to be annexed. (Revised Laws, sec. 4771.)

Guardians, executors, and administrators, when authorized by court, may sign for the lands they represent. The Secretary of the Interior may sign a petition for the annexation of lands to a district, but not for the organization of a district. (L. 1917, 271.)

*Exclusion.*—Where lands are excluded, the only ground recognized by statute is that the lands proposed to be excluded are too high to

be watered or to receive any benefit from the irrigation works. (Sec. 4782.)

*Same—Consent of United States.*—Changes in district boundaries where contract has been made with the Secretary of the Interior are prohibited unless the Secretary consents in writing. (L. 1915, 444.)

*Consolidation of districts.*—The consolidation provisions permitting union of districts are referred to in the general discussion. (See p. 83.)

*State lands.*—State lands within the district are not assessable, but the State land register and the State engineer make a thorough examination as to the benefits to accrue to State lands, and the register is empowered to contract with the district specifying the legal subdivisions benefited and the amount of benefit accruing to each tract. Such contracts shall provide for annual payments out of the general fund to the district, to be applied on the cost of construction work until the amount of such benefits is fully paid, with the option on the part of the State to pay in full at any time. The contract is contingent upon the works being properly constructed and managed, so that the benefits shall accrue.

Provision is made for crediting the State lands with the amounts paid and for procuring the reimbursement of the general fund when the State shall dispose of its lands within the district. (Rev. Stat., sec. 4787.)

*Dissolution—Division—Exclusion.*—Petition for dissolution is filed in the district court and must be signed by a majority of the land-owners owning at least two-thirds of the land. Before the order can be issued the directors must show that the district does not owe any money and that there are no outstanding bonds or other evidence of indebtedness. Similar petition may be filed for the division of the district or for the exclusion of land. The assent of the Secretary of the Interior is necessary to the division of the district or the exclusion of lands therefrom where contract has been made with the Federal Government. (L. 1915, 446.)

#### NEW MEXICO.<sup>1</sup>

The New Mexico irrigation district law will be found in the codification of 1915, sections 2949 to 3004, inclusive, as amended by chapter 100 of the Session Laws of 1915, appendix to the codification, pages 143 to 151, and as further amended by the Session Laws of 1917, chapter 21, pages 59 to 83. Organization and the incurring of indebtedness are more circumscribed than in most States.

*Organization petition.*—The organization petition must be signed by a majority of the resident freeholders owning or holding evidence of title to more than one-half of the lands in any district. Resident entrymen upon public lands of the United States are deemed resident freeholders for the purposes of the act.

*Purposes.*—Organization is to provide for the irrigation of district lands or for cooperation with the United States for the construction of works, including drainage works, necessary to maintain the irrigability of district lands, or for cooperation in the operation

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also changes resulting from subsequent enactment in 1919, *infra*, 168.



and maintenance of works already constructed, or for the assumption of indebtedness to the United States.

*Incidental powers.*—Districts have the following incidental powers: To take over the assets and assume the liabilities of water users' associations organized for cooperation with the United States under the Federal reclamation act in case a majority of the lands of the association shall be within the district and the association shall agree to the transfer; also to construct and control plants for the generation, distribution, sale, and lease of electrical energy, including the sale to municipalities, corporations, or persons of the energy generated; to promote the agricultural resources and marketing facilities of the district; and to make appropriation of money and take other action necessary to effectuate the purposes enumerated. (L. 1917, 59.)

*Irrigated lands exempt.*—Where, however, ditches or reservoirs have been constructed prior to March 18, 1909, the date of the original irrigation district law, such ditches, reservoirs, and franchises, and the lands irrigated are exempt from the operations of the law, unless the district be formed to acquire or rent such ditches, reservoirs, and their franchises, or unless a statement signed by four-fifths of the owners of the same and the lands irrigated therefrom be filed with the county commissioners (to whom the petition is addressed) of the county in which the system is located, consenting that the same be included.

*Community ditches.*—Water users under community ditches, established by the Spanish law, in towns or villages in this State are not affected as to their voting power upon the question whether any such ditch shall be included in an irrigation district, and each of said water users has the same right and voice in determining such question and in the signing of the statement provided for in section 2949 (sec. 1) as he has in the control and management of such ditch (sec. 2).

*Publications.*—All publications required by the law must be made in English and in Spanish, and the last publication shall be made not less than three days before the time fixed for the taking of the action therein mentioned. (L. 1917, 61.)

*Boundaries—Divisions.*—The duty of defining the boundaries after the customary hearing and examination devolves upon the county commissioners. The number of directors and divisions is graduated according to the irrigable area, ranging from three to nine. (L. 1917, 61.)

*Electors and elections.*—All persons residing within any county in which any portion of a district shall lie, and who are owners of land within the district, or of evidence of title to such land, together with resident entrymen of public lands within the district, who are qualified electors under the general election laws of the State, are entitled to vote. Registration of voters is not required. The general election laws of the State, except as otherwise specified, govern all elections. An election for organization, or upon a bond issue, or to create an indebtedness aggregating 25 cents per acre or more upon district lands, can not avail unless there shall be cast in favor a majority of the votes of the resident freeholders within the district representing a majority of the acreage owned or held by resident freeholders. (L. 1917, 63.)



As an offset to this almost prohibitive requirement, it is provided that a qualified elector may vote by mail, signing his ballot and mailing, delivering or causing it to be delivered in a sealed envelope to the secretary of the district. At this point a defect in the law is apparent since no district secretary will be appointed before the organization election. The ballots may be so mailed or delivered at any time after the commencement of the publication of the notice for election up to the time of the closing of the polls. (L. 1917, 64.)

*Cooperation with the United States.*—Cooperation with the United States includes the drainage as well as the irrigation of district lands and the provisions are in substantially the customary terms. It is provided, however, that no irrigation district formed wholly or in part upon any Federal reclamation project partially or wholly constructed at the time of the approval of the act of 1917 (i. e., Mar. 6, 1917) shall have the power to issue interest-bearing bonds to be deposited with the United States; and the payment, prior to the date when the same shall become due, of interest upon any obligation entered into between any such district and the United States is prohibited. (L. 1917, 66.)

*Water supply approved by State engineer.*—After organization the board is required to employ a competent hydraulic engineer to report upon the water supply available for the district and to estimate the average amount of water available per year for each acre of land and the probable amounts available for irrigation or storage during each week. The report must be submitted to the State engineer for approval or correction and if the report can not be so corrected as to receive his approval, or if the State engineer believe that there is not sufficient water to properly irrigate the district lands, he shall disapprove the report.

The right of appeal from the decision of the State engineer to the district court is expressly granted, the court being required to determine the sufficiency and accuracy of the report and the water supply available. Until the report is approved by the State engineer or the courts, no bond issue can be made. The functions of the hydraulic engineer and the State engineer are dispensed with in the case of Federal reclamation projects. (L. 1917, 67.)

*Bonds.*—The purposes for which bonds may be issued include the paying of the first year's interest. The bonds run for 20 years, payments upon the principal beginning at the expiration of 11 years. The district, after the same formality which governs the issues of bonds, may vote that the bonds mature in any number of years less than 20, arranging for payment in series, as above indicated. Interest shall not exceed the rate of 6 per cent per annum. (L. 1917, 93.)

When the proceeds of any previous issue of bonds has become exhausted by expenditures and it becomes necessary to obtain more money, additional bonds may be issued after an election as for the original issue. The customary proviso is added as to the preferred character of prior bond issues and prior contracts with the United States. (L. 1917, 72.)

The bonds and contract with the United States shall be paid by revenue derived from an annual assessment upon realty in the district which shall be and remain liable to be assessed for such payments as in the act provided. (L. 1917, 63.) District bonds may be

issued at par in payment for any property purchased without previous offer of the same for sale.

*Distribution of water.*—All waters distributed are apportioned pro rata to the lands assessed. The board has the power to lease or rent the use of water, either within or without the district, at not less than one and one-half times the district tax which would be payable under ordinary assessment. (L. 1917, 68.)

Water, the right to the use of which is acquired by the district under contract with the United States, shall be apportioned in accordance with the acts of Congress and the rules and regulations of the Secretary and the provisions of the district contract. (L. 1917, 69.)

*Judicial notice.*—Provision is made that judicial notice be taken of the existence of the district and prima facie evidence of its regular status becomes conclusive unless quo warranto proceedings are instituted within a year. (Stat., 1915, sec. 2963.)

*Exemption from taxation.*—Property acquired by the irrigation district is exempted from all taxation. (L. 1917, 70.)

*Determination of amount of assessments.*—The board must determine annually the amount of money required to meet the obligations, maintenance, and operating and current expenses, and certify the same to the county commissioners of the county in which the district office is located. It must also certify the amounts, if any, which will become due to the United States during the ensuing year. Provision is made for the omission of assessments where lands are in a Federal reclamation project and the district has contracted with the United States as regards any unit not upon a repayment basis and project lands for which rental charges for such year are not required, and as regards lands exempted from repayment on account of seepage and other conditions where the district is exempted from payment to the United States. (L. 1917, 74.)

Public lands of the United States are taxed subject to the act of August 11, 1916. (L. 1917, 73.)

*Assessments.*—The county assessor is required to enter upon his tax roll the owners and lands subject to taxation under the act and to deliver certified list to the county commissioners. After receiving notice from the county commissioners of the levies to be made, the assessor must extend the same upon his tax roll to be collected like other taxes. No land shall be taxed which, from any natural cause, can not be irrigated by the district system or is incapable of cultivation. (Stat. 1915, sec. 2968.)

The county commissioners immediately upon receiving the certified list of the lands in the district subject to taxation and upon the receipt of the certificate from the directors certifying the total amount of money to be raised, must fix the rate per acre of levy necessary to provide the amount of money required to pay the interest on the bonds, and to provide the money required to be raised by levy for other purposes. They must also certify the respective levies to the county commissioners of each county in which any portion of the district lies. The rate of levy necessary to raise the required amount of money must be increased 15 per cent to cover delinquencies. The county commissioners make such levy at the time of making the levy for county purposes and deliver a notice thereof to the county assessor; and in case of contract with the United States, levy shall be

made in the amounts and on the tracts as certified by the board of directors and as confirmed judicially. All taxes levied under the act are special taxes. (L. 1917, 75.)

*Drainage assessments.*—If a district contract with the United States for the construction of drainage works, the board of directors must fix and determine, subject to judicial confirmation, the rate or percentage of the benefits from the proposed works for all real property within the district to be affected thereby. The board must also assess the damages inflicted upon any real property, such amount being deducted from the assessments payable by each owner of lands damaged until compensation shall have been fully made. If the damage exceed the benefits as regards any property, a cash award must be made. The rate of benefits shall be subsequently used as the basis for annual assessment, but may be changed from time to time by the board as new or changing conditions may in their judgment require, subject to judicial confirmation. An irrigation district may assess realty within its boundaries owned by all classes of persons and corporations for drainage costs to the same extent as drainage districts are empowered to do. (L. 1917, 73.)

*Collections and disbursements.*—The county treasurer of the county in which is located the office of any district is ex officio district treasurer and the county treasurer of each county is required to collect all irrigation district taxes for district lands in such county in the same manner and at the same time as he is required to collect the taxes for county purposes. The funds arising from assessment and levy and accruing to the bond and United States contract fund, must be devoted to the obligations of the district and paid from said fund "in the order of the priority of the creation of the obligation." (L. 1917, 76.)

Generally speaking, the revenue laws of the State for the assessment levy and collection of taxes on real estate for county purposes, including the enforcement of penalties and forfeitures for delinquencies, apply to irrigation districts. (Stat. 1915, sec. 2971.)

*General expenses.*—To defray miscellaneous expenses, the board may fix tolls and charges for use of canal and water or it may levy assessments therefor, or both. (L. 1917, 77.)

*Eminent domain.*—The board may construct works across any watercourse, highway, etc., to which end it may exercise the right of eminent domain. Right of way for such purpose is granted over any State lands. (Stat. 1915, sec. 2975.)

*Change of boundaries.*—Petition for annexation can only be made on the part of all owners of the lands proposed to be included (Stat. 1915, sec. 2981), the proceedings being of the usual type. The change of boundaries must receive the assent of the Secretary of the Interior, if contract has been made with the United States. (L. 1915, 150.)

Exclusion of lands is provided for with the usual clause prohibiting the impairment or discharge of any contract. (Stat. 1915, sec. 2990.) The authority of the board as regards exclusion is conditional upon there being no outstanding bonds of the district. When contract has been made with the United States the assent of the Secretary of the Interior is required. (L. 1915, 150.)

*Dissolution.*—A majority of the resident freeholders representing a majority of the number of acres of irrigable land may petition the board of directors for the dissolution of the district. The petition

must state that all bills and claims have been fully settled and the board must be satisfied that such is the case. (Stat. 1915, sec. 2997.)

A majority of the votes cast is sufficient for dissolution, but if contract has been made with the United States the written assent of the Secretary of the Interior is required. (L. 1915, 151.)

*Confirmation.*—The bringing of confirmation proceedings is obligatory upon the board of directors. The provisions extend not only to the authorization of bonds and of contract with the United States, but also to the ascertainment of the rate or percentage of drainage benefits and of the award for damages inflicted by drainage works where contract has been made with the United States. The assessment and award in such cases are covered by decree. Moreover, inclusion and exclusion proceedings in the discretion of the board may be confirmed in the same manner. (L. 1917, 80.)

The confirmation proceedings in other respects are of the usual type.

Districts organized prior to the passage of the act of 1917 are confirmed and are rendered subject to the provisions of the act in the future so far as applicable, but vested rights are specifically protected. (L. 1917, 83.)

#### NORTH DAKOTA.<sup>1</sup>

North Dakota had no irrigation district law until 1917, when an act was passed, being chapter 115, approved March 8, 1917. (L. 1917, 125.)

*Petition for organization.*—In North Dakota the petition for organization addressed to the board of county commissioners must be signed by a majority of the electors of the district representing "a majority of the whole number of acres owned or held by electors of the proposed district." Electors include residents of the State holding not less than 10 acres within the district and entrymen upon public lands therein or holders of leases to the extent of 40 acres of State land with not less than five years still to run. The purposes of organization as set forth do not expressly include the formation of districts, where provision for irrigation has already been made, in order to provide a vehicle for operation and maintenance. A majority of the votes cast determines the organization election. (Secs. 1 and 2.)

*Lands exempted.*—It is provided where ditches have been constructed prior to the act sufficient to water the lands under the district, that such ditches and the franchises and the lands thereunder shall be exempt from the operation of the law, except such district shall be formed to make purchase of such ditches and franchises. (Sec. 1.)

*Report of State engineer.*—Four weeks before the date of hearing before the county board the petition, maps, etc., must be filed with the State engineer, whose duty it is to examine the same, and if necessary, to examine the district and its proposed works, and report the matter to the county board.

*Boundaries and subdivisions.*—The county commissioners define the boundaries, making no changes to exempt irrigable lands, but

<sup>1</sup> See p. 87 for the purpose and scope of this discussion.

shall include no land in the district which, in the judgment of the board, will not be benefited. The district is divided into three, five, or seven divisions, as may be deemed best, with a director from each. (Sec. 2.)

*Release of lands when no longer benefited.*—Water rights are appurtenant to the land, but if any tract to which water right has attached shall become subirrigated so that water is no longer beneficial, the owner or entryman may apply to the board to relieve such land from assessment, releasing his water right until drainage has been supplied and water may beneficially be used. Application may be made for transfer of such water right to other lands within the district or for the inclusion of the land to be irrigated and the exclusion of the subirrigated area. (Sec. 9.)

*Plans submitted to State engineer.*—When the plan for irrigation has been formulated, the board is required to submit the same to the State engineer, who shall report to the board such matters as he may desire. (Sec. 13.)

*Bonds.*—Bonds are payable over the period from the expiration of the eleventh year to the expiration of the twentieth year, but the district by a majority vote may provide for a lesser period, and may similarly provide for the payment of interest not exceeding 6 per cent on due and unpaid interest coupons attached to outstanding bonds. (Sec. 13.)

Bonds may be sold for not less than 95 per cent of the face value thereof. (Sec. 14.)

*Assessment.*—Separate district assessor and treasurer are provided for. (Sec. 4.) The assessor is required to determine the benefits which will accrue to each tract on account of the construction or acquisition of the irrigation works. (Sec. 16.) The board of directors acts as a board of equalization (sec. 17), and the apportionment thus reached "shall be and remain the basis for fixing the annual assessments levied against such tracts." The list of apportionment, with the amount and rate per acre, is prepared by the assessor, or a map showing the rate may be prepared. The whole amount of the assessment of benefits must equal the amount of the bonds or other obligations voted. (Sec. 16.)

*Levy and collection.*—The levy is made by the board and the county auditor enters the amount of each fund in separate columns on the tax list of his county. If the board neglect to cause levy and assessment to be made the assessment for the preceding year must be adopted. Tax lists when delivered to the county treasurer contain all taxes in each fund levied on each tract by the board. The county treasurer is required to collect assessments in the same manner as other taxes against real estate are collected, the revenue laws for collection and sale of land for taxes being made applicable. (Sec. 21.) Taxes are paid by the county treasurer to the treasurer of the district. (Sec. 19.) The board has the power to make an additional levy not to exceed \$1 an acre to create a special fund for the payment of overdue obligations of prior years for operation, maintenance, and current expense. (Sec. 21.)

*Warrants.*—Warrants in excess of 90 per cent of the levy for the year are prohibited. (Sec. 20.)

*Priority of obligations.*—The lien for payments due to the United States where bonds have not been deposited are a preferred lien to

that of any other issue of bonds subsequent to the date of contract. Funds arising from assessment and levy are devoted to the obligations of the district payable from said funds in the order of the priority of the creation of the obligation. (Sec. 21.)

*Refund when lands not benefited.*—Payments made under protest are refundable where the lands assessed could not for the time being be benefited by irrigation on account of subirrigation. (Sec. 22.)

*Confirmation.*—The confirmation proceedings in this State are obligatory before the issuance and sale of bonds. (Sec. 59.)

*Registration.*—After the court shall have determined the validity of the organization the directors are required to prepare a statement showing all proceedings from the petition for organization of the district to decree of court, present the same with the bonds certified by them under oath to the State engineer. The latter official shall examine the statement and the bonds, and if satisfied that the same conform with the law and are in due form, he shall record the statement and register the bonds in his office. No bonds shall be issued or valid unless registered and endorsed by the State engineer showing compliance with the law. The provision is optional as to bonds heretofore issued or being issued when the act went into effect. (Sec. 63.)

*Special assessments.*—Provision is made for special assessments after a majority vote of the district, 15 per cent being added to the rate of assessment for anticipated delinquencies. (Sec. 30.)

*Drainage.*—The usual prohibition is made against unauthorized debts with the added proviso that the district "shall have the power to and it shall be its duty to provide for the proper drainage of any and all lands embraced within its limits which are or have been subirrigated by reason of the lawful use of water from its canal by the owner or lessee of the lands subirrigated or from any cause not the fault, or by the consent of such owner or lessee." For such drainage purposes the power is given the district to levy special assessments or otherwise provide funds necessary properly to drain such lands. The power to contract with the United States for drainage purposes is also expressly given. (Sec. 31.)

*Contract and cooperation with the United States.*—Districts are expressly authorized to contract with the United States for irrigation or drainage purposes whereby the bonds of the district would be guaranteed by the United States or financial credit extended by the Federal Government to the district (N. B.—Federal bills for the foregoing purpose failed of enactment), and also for the sale, purchase, or use of irrigation or drainage works or other property owned or to be acquired for the use of the district. (Sec. 68.)

The usual provisions relative to cooperation with the United States expressly extend to drainage. (Sec. 69.)

*Liability for negligence.*—Irrigation districts are liable in damages for negligence or failure in delivering water to the users from the district canal in like manner as private persons and corporations. A prerequisite, however, is that the party aggrieved shall within 30 days after such failure serve notice in writing upon the chairman of the board, setting forth the acts constituting the negligence or omission and stating that he expects to hold the district liable; and provided further that action shall be brought within a year from the accrual of the cause. (Sec. 75.)



*Changes of boundaries.*—The procedure for including additional lands is in a general way similar to that of most of the other States. The exclusion proceedings provide that unless the holders of outstanding bonds or the Secretary of the Interior, if contract with the United States shall have been made, assent to the change of boundaries, the board shall deny and dismiss any petition for the exclusion of land. (Sec. 52.)

*Dissolution.*—Dissolution of districts can be initiated only by a majority of the assessment payers representing a majority of the irrigable acreage. Petition is presented to the board of directors. If upon the winding up of affairs the money realized from the sale is insufficient for the payment of all debts of the district, assessments shall continue to be made under the law relating to bonded and other indebtedness "until a sufficient amount is raised to fully pay all obligations of such district."

Where contract shall have been made with the United States the board of directors is without power to take any action looking toward dissolution of the district unless written consent of the Secretary of the Interior shall have been filed with the board and a certified copy filed in each county wherein district lands are situate. (Sec. 70.)

#### OKLAHOMA.<sup>1</sup>

Oklahoma passed an irrigation district law first in 1915, which is to be found as chapter 226, Session Laws of 1915, 485 to 538.

*Organization.*—Petition for organization is addressed to the county board, to be signed by a majority of the electors of the district representing a majority of the whole number of acres belonging to the electors of the district. Electors must be residents of the State, owning not less than 10 acres or holding leaseholds in not less than 40 acres of State land within said district for not less than five years from the date of any given exercise of the elective rights. Corporations, however, may act through duly authorized agents. Organization is on the part of those desiring to provide for irrigation. Ditches constructed before the passage of the act of sufficient capacity to water the lands thereunder for which the water was appropriated, are expressly exempted from the law unless the district shall be formed to purchase such ditches and franchises, with the provision that the law shall not be construed in any way to affect the rights of such prior ditch owners. (Secs. 1 and 2.)

After due investigation and the formulation of plans copies of the petition and all maps are required to be filed with the State Board of Irrigation, it being the duty of the secretary of the board to examine the same, and, if advisable, the proposed district and works. He must also prepare a report to the county board at the hearing upon the petition. The board may thereupon amend the plan of irrigation as deemed best. (Sec. 2.)

A majority only of the votes cast on the organization election is necessary for organization. (Sec. 3.)

*Distribution of water.*—All waters distributed for irrigation purposes are apportioned ratably to each landowner upon the ratio

<sup>1</sup> See p. 87 for the purpose and scope of this discussion.

which the last assessment of such owner for district purposes within said district bears to the total sum assessed upon the district. (Sec. 9.)

Water acquired under contract with the United States, however, is apportioned in accordance with the acts of Congress, rules and regulations of the Secretary of the Interior, and the provisions of contract with the United States. (Sec. 9.)

*Publicity.*—Exceptional requirements for publicity as to the activities of the board are laid down, all meetings being required to be advertised, and records of the board must be published at the close of each regular or special meeting. (Sec. 10.)

*Construction work.*—The plans for construction work must be submitted in detail to the State board of irrigation, highways, and drainage prior to the holding of an election upon a bond issue. The board is required to report upon the same, whereupon the district directors determine the amount of money to be raised and the question whether or not bonds shall be issued to an amount which must not exceed the actual estimated cost of the ditches, the aggregate purchase price of the property, together with one year's interest upon the bonds. Upon the election a mere majority of those voting is sufficient. The board is required at least annually to report to the secretary of the State board of irrigation the condition of the work and the success of the plans and whether or not the available funds will suffice for completion. The secretary of the State board shall make such recommendations to the directors as he may deem advisable. (Sec. 13.)

*Bonds.*—The bonds run for 20 years, installments upon the principal beginning at the expiration of the eleventh year, but by a majority vote bonds may be authorized maturing in less than 20 years and a majority vote may also authorize the payment of interest not to exceed 6 per cent on any due and unpaid interest coupons attached to valid outstanding bonds. (Sec. 13.)

Such bonds and the interest shall be paid by revenue derived from an annual assessment on the real property of the district, which "shall be and remain liable to be assessed for such payments as herein provided, and all payments due or to become due to the United States." (Sec. 15.)

*Assessor and treasurer.*—The district has its corporate district assessor and treasurer. (Sec. b.) The assessor must assess all real property of the district at its full cash value less the value of all improvements, also leasehold estates in all leased State lands less the improvement upon the same, including all city and town property in the district. (Sec. 16.)

The assessment book must be delivered to the secretary of the board of directors. (Sec. 17.)

The district taxes are collected by the county and township treasurers as public taxes are collected. Such treasurers pay the same over to the treasurer of the irrigation district. (Sec. 19.)

*Equalization and levy.*—After receipt of the assessment book from the district assessor and following equalization, the board must levy an assessment sufficient to raise principal and interest on the bonds, payments due to the United States, and, if necessary, for the care and maintenance of the irrigation works. The amount of taxes in each fund levied upon each tract is certified to the county clerk of the

county in which the land lies and the clerk enters the same on the tax lists of the county.

If the board neglect to make the assessment for district purposes, the assessment made for county purposes as adjusted by the county equalization board becomes the basis for the district taxes and the county board is required to cause an assessment roll of the district to be prepared. (Secs. 17 and 19.)

*Warrants.*—No district may issue warrants in excess of 90 per cent of the levy for the year, but if there are obligations against the district previously contracted, the board may make an additional levy not to exceed 2 mills on the dollar of the assessed valuation to create a special fund for the payment of past due obligations. (Sec. 20.)

*Tax sales.*—Provision is made for the sale of leasehold estates upon State lands for taxes in the same manner as land. (Sec. 21.)

*Refund where lands not benefited.*—Provision is made for the directors to pass upon the disposal of moneys paid under protest to the county treasurer and a refund may be ordered where the lands could not be benefited by irrigation either on account of subirrigation or nonirrigability. (Sec. 22.)

*Construction and other expenses.*—Construction work is paid for out of the construction fund or the bonds of the district may be used at their par value, after they have been advertised for sale and no bids received therefor at 95 per cent or upward of their face value. If the construction fund resulting from the sale of bonds be insufficient, annual assessment and levy may be resorted to. For expenses of organization, operation, maintenance, and improvement the board may either fix tolls and charges for the use of water or may impose annual assessments or both.

*Power to borrow money.*—Additional funds may be borrowed for unforeseen operation and maintenance expenses not to exceed 50 cents per acre upon the land. (Sec. 26.)

*Excess liabilities.*—The officers of the district are prohibited from incurring any liability in excess of the express provisions of the law, any such liability being declared void.

*Drainage.*—It is provided in the clause prohibiting excess liability, however, that the district is empowered and "it shall be its duty to provide for the proper drainage of any and all lands embraced within its limits which are or have been subirrigated by reason of the lawful use of water from its canal by the owner or lessee of the lands subirrigated or from any cause not the fault or by the consent of such owner or lessee." For drainage the district has the same power of assessment and levy or otherwise for providing the funds necessary for drainage together with the right to contract therefor with the United States. (Sec. 27.)

*Special assessments.*—The board may call an election upon a special assessment for the raising of money for the purposes of the act. The rate of assessment is reached by deducting 15 per cent from the aggregate assessed value of the district property for anticipated delinquencies. (Sec. 30.)

*Inclusion and exclusion.*—Where lands are to be included in the district petition can be made by owners representing one-half or more of the land to be included. (Sec. 35.)

Owners desiring to be excluded may sign a petition therefor addressed to the district board but the assent of holders of outstanding bonds or the Secretary of the Interior, if contract be made with the United States, must be filed, otherwise the board is required to dismiss the petition for exclusion. (Sec. 51.) If such assent be filed, a majority vote upon the election will suffice. (Sec. 53.)

Changes of boundaries must not impair any contract, obligation, lien, or charge for which any land to be excluded would otherwise have been liable (sec. 34), and where contract has been made with the United States the assent of the secretary is required (sec. 41).

If any tract shall become subirrigated so that water no longer is of benefit for irrigation purposes, the owner may apply to the district board to exclude such lands from the district, releasing all claim for a water right. He may apply for a permit to transfer the water right to any other land upon which the same may be profitably applied and to have such new tract included within the district. (Sec. 9.)

*Confirmation.*—The confirmation proceedings in Oklahoma are obligatory before the issuance of any bonds.

The act of March 23, 1917 (chs. 179, 337) has made special provision for confirmation proceedings. The board of directors in their discretion before making any contract with the United States or with others or the levying of any assessment or the taking of any particular steps or action must commence a special proceeding in the district court whereby the proceedings of the board thereunto and the validity of any of the terms of any contract shall be judicially examined, approved, and confirmed. The procedure follows as near as may be the procedure for the confirmation of an issue of bonds.

*Registration of bonds.*—After decree in confirmation the board is required to prepare a written statement reciting the entire proceedings of the district including confirmation decree and to present the same verified by oath of the board with the bonds to the auditor of public accounts. The auditor shall then examine the statement and the bonds and if satisfied shall record the statement and register the bonds in his office. No bonds in Oklahoma are valid unless so registered. The board of educational lands may invest such portion of the perpetual school funds of the State as may in the judgment of the board be deemed expedient in irrigation bonds so registered. The registration provisions, however, are optional as to bonds previously issued or in process of being issued when the act was passed. (Sec. 62.)

*Refunding bonds.*—The board may issue refunding bonds for no greater principal amount and to bear no greater rate of interest than the previous issue. Notice, however, must be given and hearing held prior to action. (Secs. 65 to 68.)

*Liability for negligence.*—Districts are liable in damage for negligence in delivering water from their canals in the same manner as persons and private corporations. (Sec. 69.)

*Dissolution.*—The provisions governing dissolution are practically identical with those of Nebraska, heretofore outlined. (Sec. 64.)

OREGON.<sup>1</sup>

The Oregon legislature in 1917 passed an irrigation district law (Gen. L. 1917, 743) as a complete substitute for earlier legislation.

*Petition for organization and objects.*—Irrigation districts are initiated by petition to the county court, signed by 50 or a majority of the owners of land within the proposed district. (Sec. 1.) The objects of organization include not only the construction of new works, but also the improvement or the operation merely of existing systems. (Sec. 1.) It is the duty of the county court to fix the boundaries of the district. The court is not expressly required, however, to ascertain or make findings upon the public necessity of the organization or the proposed works nor upon the benefit to the lands to be included and taxed. (Sec. 2.)

*Qualifications of electors.*—Male and female persons over 21, whether residents of the State or not, owning 1 acre or more within the district according to the last assessment roll, or having contract to purchase State or Carey Act lands, and entrymen on the public domain of the United States, are landowners under the act, having the right to vote or hold office. Corporations and fiduciaries can also exercise the franchise. (Sec. 29.)

*Officers.*—The officers of the district are a board of directors, consisting of three members, a president selected from their membership, and a secretary appointed by them. The county treasurer of the county shall be ex officio treasurer of the district.

*Construction plans.*—Before work is undertaken the construction plans must be submitted to the State engineer with a report upon the feasibility and cost of the work. The State engineer must approve or disapprove the plans within 90 days, having authority to make such field investigations as may be necessary. (Sec. 15.) The construction work must be supervised by an irrigation engineer, subject to the approval when completed of the State engineer. Construction under contract with the United States is not thus supervised. (Sec. 16.)

Districts may join in securing irrigation works, the cost to be apportioned according to acreage. (Sec. 32. See supra p. 81.)

*Drainage work.*—The act authorizes drainage work by irrigation districts organized either before or after the passage of the new law, and whether for the benefit of lands actually requiring drainage or as an advance protection. Such drainage work may be done simultaneously with the construction of the irrigation system or otherwise. It is declared that the powers of the district as regards drainage are equal to its powers with respect to irrigation. (Sec. 34.) Contract for drainage as well as for irrigation may be made with the United States. (Sec. 18.)

*Bonds.*—The bonds of the district (for irrigation or drainage) may be issued to mature serially in not less than 5 years nor more than 40 years after the date of issue, as the board may determine. If authorized by the electors, the first four years' interest or less may be included in the bonded indebtedness. Interest shall not exceed 6 per cent per annum. (Sec. 20.) The sale of bonds must be

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 169, for 1919 amendments.

advertised, and bonds may not be sold for less than 90 per cent of their face value.

*Delinquent tax sales.*—The district may purchase at delinquent tax sales in the absence of other bidders taking title to the land, and disposing of the same as any other purchaser. The district is expressly prohibited, however, from bidding more than the total of all taxes against the land with interest and penalties, and is required to pay cash for such taxes. It is authorized to include such payments in the operating expenses to be assessed as maintenance charges. (Sec. 22.)

*Assessments.*—A computation of the moneys necessary to be raised by the district is made by the board. Each acre of irrigable land is assessed the same as every other acre, provision being made that the amount to be paid any landowner for easements or other property required by the district may be deducted from his proportionate part of the cost of the reclamation. It is provided that upon lands having water rights appurtenant thereto, assessments other than those for operation and maintenance and drainage shall be in the same proportion to full assessment as the additional water right to be supplied bears to a full water right, and, for the purposes excepted, such lands having a partial water right shall be assessed as other lands. Where the contract with the United States has been made the amounts payable shall be fixed in compliance with the Federal reclamation laws, public notices and orders thereunder, and with the contracts between the district and the United States, lands having partial rights being assessed in proportion to benefit. (Sec. 24. For State land taxation see p. —.)

*Equalization.*—The work of equalization devolves upon the board of directors (sec. 25), after the completion of which certification is made to the county treasurer, who enters the apportionment upon the county assessment roll as the irrigation district tax in the same manner that other municipal assessments are entered. The method of collection and accounting is the same as for other municipal taxes. State lands, including segregations under the Carey Act, are subject to taxation by the district; also public lands of the United States to the extent authorized by the act of Congress of August 11, 1916. (Sec. 27.) Should the board neglect or refuse to perform its duties in assessment and levy, the assessment is made, equalized, and levied by the county court. (Sec. 27.)

*Eminent domain.*—The eminent domain provisions include the right to condemn property already devoted to public use, whether for irrigation or otherwise, which is less necessary than the use proposed by the district. Rights of way over State lands are dedicated. The use of water for irrigation by districts together with rights of way and other property is expressly declared to be a public use more necessary and beneficial than any other use, public or private, to which the water, lands, or other property have been or may be appropriated within the district. (Sec. 31.)

*Confirmation.*—Any district assessment payer or other interested person may bring confirmation proceedings in case the board shall not have acted within 30 days. The scope of the confirmation extends not only to the organization and authorization of bonds or of contract with the United States, but also to orders changing the



boundaries, declaring the result of any election, or levying any general or special assessment. (Sec. 41.)

*Bonds as investments.*—The board of any irrigation district may apply to a commission consisting of the attorney general, the State engineer, and the superintendent of banks for the purpose of obtaining certificate upon bonds of the district. If approved by the commission certification is made by the secretary of state that such bonds are legal investments for trust funds and for the funds of all insurance companies, commercial and savings banks, trust companies, and bonding companies. Whenever any money or funds may by law be invested in bonds of cities, counties, school districts, or other municipalities, such moneys may be invested in irrigation district bonds when certified. Such bonds may also be used for security for the deposit of public money in the banks of the State or for the performance of any act for which the bonds of other municipalities may lawfully be used. (Secs. 44 to 48.)

*Merger.*—Provisions for merger of Oregon irrigation districts are referred to in the general discussion. (P. 83.)

*Sale of water or electric power.*—Provision is made for the sale of water for lands outside the district and the furnishing of electric power by the district for use within or without the district boundaries upon proper compensation. (Sec. 33.)

*Inclusion and exclusion.*—Provisions are made for the inclusion and exclusion of land, the latter being very carefully safeguarded against loss to the creditors of the district, their consent being necessary to the freeing of the lands to be excluded from past obligations. (Sec. 37, pars. *e* and *i*.)

*Dissolution.*—The irrigation district may be dissolved as the result of a vote of 60 per cent of those voting after a petition to the board signed by a majority of the landowners of the district and advertisement for the election. The board must find that all claims and obligations against the district have been fully paid. (Secs. 39 and 40.)

#### SOUTH DAKOTA.<sup>1</sup>

The South Dakota irrigation district law will be found in the Session Laws of 1917, chapter 282, beginning at page 542.

This enactment has a common origin and is practically identical with the North Dakota statute of the same year, which has already been outlined. (See pp. 135-138.)

There are two features, however, in which the South Dakota law diverges from that of North Dakota, and these are:

First, the requirement that in addition to the organization election being carried by a majority of the votes cast, such votes must "also represent a majority of the acreage within the proposed district owned or held by the electors thereof" (sec. 3); and

Second, a provision that "all common school and endowment lands located within any irrigation district and susceptible of irrigation, shall be offered for sale according to law within five years after the time water is available for irrigation, and after sale shall be included in the district as in this act provided for including additional lands." (Sec. 36.)

<sup>1</sup> See p. 87 for the purpose and scope of this discussion.

*Bonds.*—Mature in 20 years and bear interest at a rate not exceeding 6 per cent per annum. (L. 1917, 555.)

#### TEXAS.<sup>1</sup>

This State departs more widely than any other State from the usual irrigation district statute. Two unique features are that in Texas all property in the district, personal as well as real, is subject to assessment for irrigation purposes; and that the name of the corporation must indicate the name of the county and the number of the district as "—— County Water Improvement District No. —." (Sec. 10.) Another consists of the method of securing operation and maintenance charges.

The law will be found in the General Laws of Texas, 1917, pages 172 to 210, being chapter 87, approved March 19, 1917. This act repealed the former, and comparatively regular, irrigation district statutes.

*Purposes.*—The district is authorized to construct irrigation improvements, purchase existing works, or cooperate with the United States for the construction of irrigation works, including drainage works necessary to maintain the irrigability of the land. (Sec. 1.)

*Petition for organization.*—Petition for organization is presented to the county commissioners' court on the part of a majority in number of the holders of title or evidence of title to lands in the district, who shall also represent a majority in value, as indicated by the State and county assessment rolls, of all of said lands. (Sec. 1.) The district may include towns and villages, but no land shall be included in more than one water improvement district.

*Hearing on petition.*—At the hearing before the county commissioners' court, following notice as prescribed by statute, interested persons may support or oppose the district.

*Appeal.*—An appeal from the order lies to the district court where, if taken, the cause is tried de novo upon the same record and pleadings. (Sec. 4.)

*Elections and electors.*—Electors are defined as resident property taxpayers who are qualified voters of said proposed district. (Sec. 7.)

Before the district is formed, however, it becomes the duty of the tax collector of the county to make out a certified list of the property taxpayers of the district and to furnish the same to the presiding judge of the election. The same duty after the district is formed devolves annually upon the tax collector of the district. (Sec. 8.)

All elections under the act are governed by the State election laws except as otherwise provided. None but resident property taxpayers who are qualified voters of the district shall be entitled to vote at any election called by the directors. (Secs. 54 and 73.) Voters are required to qualify under oath. (Sec. 55.)

*Organization election.*—The organization election requires a majority of two-thirds of those voting. Three of the five directors constitute a quorum for ordinary purposes, but for the letting of contracts and drawing of warrants the concurrence of four directors is

<sup>1</sup> See p. 87 for the purpose and scope of this discussion.

necessary. (Sec. 13.) The offices of assessor and collector are combined in the same person, who is appointed by the directors. (Sec. 15.)

*Boundaries to be marked.*—The directors must have the boundaries of the district marked by suitable monuments. (Sec. 16.)

*Exclusion of lands.*—The owners of lands within the district may, within 30 days after organization of the first board, petition for exclusion from the district. (Sec. 17.) Notice of hearing is given (sec. 18) and the board, if it is determined that any land is not susceptible of irrigation from the proposed system, shall exclude such land, the owners thereby waiving all rights to be served with water. (Sec. 19.)

*Inclusion of lands.*—Similarly owners of lands contiguous to the district may petition the board to be included. Favorable action may be taken provided such land may be irrigated without prejudice to the rights of any of the original territory which is "to be first furnished with an adequate supply of water." The lands admitted, however, become subject to their proportionate share of the bonded indebtedness and other expenditures by the district. No time limit is placed upon the privilege of making this petition. If contract has been made with the United States no lands shall be admitted without the written consent of the Secretary of the Interior. (Sec. 20.)

*Powers of directors.*—The powers of the board are similar to those in other States and include the making of contract with the United States for construction, operation, and maintenance of irrigation and drainage works, as well as the usual clauses for cooperation with the United States. (Sec. 21.)

The customary penal clauses against misconduct by the directors are broadened to include the engineer of the district and all employees. (Sec. 22.)

*Assessments.*—Immediately upon the qualification of the assessor and collector he shall proceed to make "an assessment of all the taxable property, both real, personal, and mixed, in his said district; and such assessment shall be made annually thereafter." An affidavit by the owner or his agent shall accompany the assessment and the full value of the property shall be stated.

*Assessor.*—The assessor must also make lists of all property not rendered for taxation, and all laws and penal statutes providing for the rendition of property for State and county taxes are made applicable to irrigation districts. (Sec. 25.)

*Equalization of assessments.*—The directors of the district appoint three commissioners who constitute a board of equalization (sec. 26) which meets annually to examine the assessment lists (sec. 38). They must see that all property has been rendered at its full value, having power to correct assessments, and must add any property omitted. (Sec. 28.)

*Collection of taxes.*—After equalization the assessment books are returned to the assessor and collector, who makes up the assessment (sec. 34), collects all taxes, and pays the same over to the official depository selected by the district (sec. 35).

The assessor and collector is charged by the directors with the total assessment shown by the rolls, proper credit being given for all moneys paid over to the depository. (Sec. 36.)

*Delinquent tax foreclosure.*—After publication, lands delinquent are required to be foreclosed and sold through appropriate suit. (Secs. 41 to 44.) Upon request of the owner such land may be sold

in subdivisions less than the whole, only such portion being sold as may be necessary to satisfy the judgment. (Sec. 45.)

Delinquent personal property taxes bear interest and penalties, the collector being required to seize and levy upon so much personal property as shall be sufficient for the recovery of the taxes, penalty, and interest. If no personal property is found the delinquent tax list is made up charging the owner with the amount assessed against him. (Sec. 48.)

The right to redeem delinquent lands may be exercised by the taxpayer "at any time before his lands are sold under the provisions of this act by paying to the collector the taxes due thereon" with the interest and penalties. (Sec. 49.)

*Plans of proposed works.*—Following the establishment of the district, the qualification of the board of directors and the return of the list of assessments, the directors may appoint an engineer to prepare a survey of the lands and plans and estimates for the proposed works in detail, unless contract is to be made with the United States. (Secs. 50 and 51.)

*Bonds and United States contracts.*—Thereafter the board may order an election for the consideration of the bonding of the district or the making of contract with the United States. (Sec. 52.) The bond or Federal contract requires a two-thirds majority of those voting. (Sec. 56.) Provision is made that where the directors find it necessary to modify the district or its improvements or to purchase or construct further improvements and to issue additional bonds or make supplemental contract with the United States, they may do so following a two-thirds vote by the electors. (Sec. 57.) The bonds mature not later than 40 years from date of issue and bear interest at not exceeding 6 per cent per annum. (L. 1917, 190.)

*Former limitation of indebtedness.*—Prior to 1917 the bonded indebtedness or debt assumed for construction purposes in favor of the United States was limited by law pursuant to Article III, section 52, of the State constitution to not exceed one-fourth of the assessed valuation of the real property of the district (sec. 23), as shown by the assessment thereof made for the purpose of determining the value thereof, or at the last annual assessment.

*Constitutional amendment.*—An amendment to the constitution, however, was adopted in that year granting the legislature power to authorize all such indebtedness as may be necessary to provide for the conservation and development of all the natural resources of the State, including irrigation and drainage among the means thereto. For this purpose conservation and reclamation districts may be created. The indebtedness thus authorized may be evidenced by bonds, which shall be a lien upon the property of the district and shall be discharged by funds raised by assessment and levy.

*"Conservation districts."*—Under this amendment, the legislature passed an act providing for the creation of such conservation and reclamation districts in the manner in which water improvement districts are organized. Districts whether organized before or after the passage of the act, may avail themselves of the provisions of the constitutional amendment and of the act and become conservation and reclamation districts, thus removing the constitutional limitation of indebtedness.

*Election to secure constitutional privilege.*—Upon presentation to the directors of such district of a petition signed by 20 per cent of the owners of lands in any water improvement or irrigation district praying that the district be made a conservation and reclamation district for the purposes of the act, it becomes the duty of the board to call an election. Such election is conducted as provided for general elections in such districts. If the vote is favorable to the change, the district becomes a conservation and reclamation district upon order of the directors without change of name or impairment of obligations previously incurred. (Fourth called session, 1918, 40.) The Supreme Court of Texas in the case of Dallas County Levee District *v.* Looney, has upheld the validity of this act in a decision based primarily upon levee district questions, but having equal application to irrigation districts. This decision (unprinted) was rendered on December 18, 1918.

The bonds under the act may not be made payable more than 40 years after the date. The usual preference in the order of priority of time is given to bond issues and contracts with the United States. (Sec. 58.)

*Confirmation.*—No suit can be brought contesting the validity of the district or of the bonds or Government contract except in the name of the State of Texas and by the attorney general, either upon his own motion or that of a party affected thereby upon good cause shown except as in the act provided. (Sec. 59.)

Before any bonds are offered for sale an action must be brought in the district court to determine the validity of the bonds, for which jurisdiction of all parties is had by publication. At the request of the Secretary of the Interior a similar action may be brought to determine the validity of the Federal contract. In such cases notice must be served with a copy of all proceedings (sec. 60) upon the attorney general, who is then required to examine the proceedings and file an answer tendering the issue of the legality of the bonds or contract. Sec. 61.)

If the judgment be adverse to the district any error committed may be corrected as directed by the court and a judgment rendered showing that the corrections have been made. This judgment is received as *res judicata* in all cases relating to the bonds, the collection of moneys for the United States, and the validity of the district. (Sec. 62.)

*Bonds to be certified.*—The comptroller is required to attach to each bond a certificate bearing his signature and official seal, showing that the decree has been filed in his office. (Sec. 64.)

*Sale or exchange of bonds.*—The directors may offer and sell the bonds upon the best terms possible, but at not less than the face value thereof. They may exchange the bonds for property or in payment for work. (Sec. 66.)

*Levy.*—The directors must levy a tax upon all property in the district sufficient to pay the interest and provide a sinking fund to redeem the bonds at maturity. If contract be made with the United States a tax shall be levied to meet the installments as they become payable. (Sec. 68.)

The tax is levied in connection with the original bond issue, remains in force from year to year as the levy for that purpose, until a new levy shall be made. The board may from time to time increase

or diminish such tax so as to adjust the same to the taxable values of the property and the amount to be collected, so as to raise a sufficient amount to pay the interest and sinking fund on outstanding bonds. (Sec. 112.)

*Funds.*—All moneys received from taxation are covered into an interest and sinking fund, which shall only be paid out for satisfying the bonds or contract with the United States. (Sec. 69.)

The moneys collected by assessment, or otherwise, for the maintenance and operation of the system are covered into the maintenance and operating fund. (Sec. 70.)

*Eminent Domain.*—The right of eminent domain includes the property necessary for drainage ditches and levees, but may not be exercised against land used for cemetery purposes and property owned and used to supply water and for levees and drainage ditches. (Sec. 77.)

The right to acquire property and to condemn is followed by a prohibition against the condemnation of any irrigation system built by any individual or corporation authorized to appropriate water and construct works, but any such system may be acquired by contract with the owners. (Sec. 24.)

*Dissolution.*—Three methods for dissolution are provided:

First, if any district has not within two years following organization begun to acquire the necessary property and diligently to pursue the purposes of the district it may be dissolved without the necessity of taking any action. Judgments for debts may be obtained against such dissolved districts and are enforceable in the same manner as judgments against disincorporated cities or towns.

Secondly, when all obligations have been fully discharged the district may dissolve by following the same procedure as is prescribed for its organization.

Thirdly, districts may also voluntarily abolish their corporate existence in the manner prescribed for drainage districts. (Sec. 79.)

*Districts lying in two or more counties.*—Organization of districts lying partly within two or more counties is not obtainable as elsewhere through petition to the board wherein the larger area is situated, but through petition to each board of county commissioners. An election is then held in each county, but a two-thirds vote of the district as a whole, as shown by canvass by the county judge of the district having the larger acreage, suffices for organization. (Sec. 80.)

Provision is also made for the annexation, by special proceedings, of lands lying in an adjacent county. An election must be held in the established district, at which a two-thirds majority of the resident property taxpayers is required to authorize the inclusion. (Sec. 83.)

*Construction work.*—More than usually elaborate provisions are prescribed with regard to the functions of the board of directors in their construction work. (Secs. 84 to 94.)

*Revenue for operation and maintenance.*—The entire operation and maintenance cost is not obtainable by taxation or through levying such assessments as public corporations customarily levy and as these districts levy to secure construction funds.

Every person desiring to receive water during any year must furnish to the secretary a statement showing the acreage to be irrigated



and the kind and area of crops to be planted, and must pay at the same time such proportion of the water charge or "assessment" (in reality in the nature of tolls) therefor as may be prescribed by the board. If he fail to do so there is no obligation upon the district to furnish him water for that year.

*Same—distinction between user and nonuser.*—The board must estimate the expense for the year for operation and maintenance of the system and a portion thereof, not less than one-third nor more than two-thirds, shall be paid by pro rata assessment, of the usual type, against all areas which the district is in position to water by its system, whether actually irrigated or not. The remainder of the estimated cost shall be paid as charges or "assessments" by the persons actually applying for water, to be prorated among the applicants, having due consideration of the acreage irrigated and the crops of each water user. Each water user shall pay the same price per acre for use upon the same class of crops, but the distinction which relieves one who fails to put the water to use from the proportionate cost in full required by the laws of other States is believed to be a step in the wrong direction and favoring the speculative holder. These charges are paid in installments and at times to be fixed by the board, but when the crops are harvested the entire unpaid "assessment" at once becomes due and must be paid within 10 days thereafter and before the removal of the crops from the county.

The board is authorized, in its discretion, to require every water user to enter into a contract with the district covering his needs for the year, and to require negotiable notes as security. The contracts, however, are not to constitute a waiver of the lien upon the crops, which is expressly given by the act. The board is authorized further to borrow money at interest not to exceed 10 per cent for operating and maintenance expenses and to hypothecate its notes or contracts with the water users. The crop lien of the district to secure assessments is superior to all other liens upon the crops, and the district's assessments bear interest at 10 per cent. Further security is obtained in the right of the district to shut off water for nonpayment, the provisions as to security running with and binding the land. Moreover, delinquents in these assessments are posted.

*Same—where Government contract.*—In case of contract with the United States the same remedy applies as to operation, maintenance, and rental charges. The Federal reclamation laws, however, are declared to be applicable and all water, the right to the use of which is acquired by the district under contract with the United States, shall be distributed and apportioned in accordance with the acts of Congress, the rules and regulations of the Secretary of the Interior, and the provisions of the contract. (Sec. 95.)

The assessments for operation and maintenance are collected under the direction of the board by the assessor and collector of taxes. (Sec. 98.)

*Additional assessments.*—In case the revenue thus received is insufficient for the expenses of the district, the balance is assessed pro rata in accordance with the assessments previously made for the then current year and are paid under the same penalties within 30 days from the time the additional assessment is made, due notice of which is given both by posting and mailing. (Sec. 96.)

*Drainage.*—Included in the plans of any district may be the necessary drainage ditches and the levees required for the protection of the land under the system. Water improvement districts may purchase the systems of drainage districts provided the debts of the latter are assumed. (Sec. 97.)

*Depository.*—The district selects a depository of its moneys under the provisions applicable to counties. (Sec. 100.) A competent auditor to examine the books and accounts of the depository must be appointed each year. (Sec. 104.)

*Joint construction of works.*—Two or more districts may jointly construct and own irrigation works and reservoirs under written contract pursuant to ratification election which must carry by a majority vote in each of the two districts. The management and construction is undertaken jointly by the two boards. (Sec. 106.)

*Transfer of water right.*—Lands within the district which are difficult to irrigate may be permitted to have the water right transferred to other lands adjacent to the district, which may be admitted upon an equal basis of water service. (Sec. 110.)

*Investment of sinking funds.*—Moneys in the sinking funds may be invested in bonds of the United States, the State of Texas, any county, irrigation or water improvement district, city, town, or school district in the State of Texas, provided such bonds do not mature subsequent to the time of maturity of the bonds for the payment of which the sinking fund was created. (Sec. 113.)

*Refunding bonds.*—Refunding bonds may be issued bearing the same or a lower rate of interest than the old issue and may be applied to the purchase of the old bonds redeemed at par or at a discount. The comptroller of public accounts shall not register the new bonds until the old bonds in lieu of which they are issued are presented for cancellation or are covered by a valid contract. If the new bonds are of the same amounts and have the same dates of maturity as the old bonds, they may be authorized without an election, but if they create a greater burden in any respect than the old bonds, an election must be held under the same provisions of law as in the case of an original issue of bonds. (Sec. 116.)

*Districts in unorganized counties.*—Persons in any unorganized county desiring to organize a water improvement district may petition the commissioners' court of the county to which the unorganized county is attached for judicial purposes. (Sec. 117.)

#### UTAH.<sup>1</sup>

The Utah law will be found in chapter 74 of the Session Laws of 1909, pages 144 to 168, as amended by the laws of 1913, chapter 101, page 194, and by Laws, 1917, chapter 33, page 77.

*Two methods of initiating.*—In Utah, in distinction from all other States, irrigation districts may be initiated not only by the land-owners, but it is provided that the governor of the State, upon recommendation of the State engineer, may propose the organization.

*Purposes.*—The purposes of organization are "in interest of conserving and putting to beneficial use the public waters of the State, and preventing undue waste thereof."

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 170, for changes made by substitute act passed in 1919.

*Petition.*—If the landowners act, it may be by petition to the board of county commissioners on the part of 50 or a majority of the owners.

Resident entrymen, subject to the provisions of the Federal act of August 11, 1916, and purchasers of State lands in the district, are within the definition of owners of land. (Id.)

*Irrigated lands exempt.*—Where, however, irrigation systems have been constructed before the passage of the act, these systems and "the lands fully watered thereby shall be exempt from the operation of this law except such district shall be formed to purchase, acquire, lease or rent such ditches, canals, reservoirs, and their franchises, or unless such district shall be formed to make contract with the United States under any Federal law." (Secs. 1 and 2, L. 1917, 77.)

*Water survey and allotment.*—The petition, besides the usual prayer, is required to apply for a water survey and allotment of water for the lands within the proposed district. The county board sends a copy of the petition to the State engineer with the request that water survey and allotment be made. The State engineer must make same for each 40 acre tract or smaller tracts in separate ownership and report to the county board, after which notice of hearing is given. (Sec. 2, L. 1917, 78.)

*Hearing on petition.*—The county board, upon the hearing, determines, lists, and plats the lands to be included and hears applications for changes. Lands not embraced in the petition may be included at the hearing and allotted water by the county board "using the allotment made by the State engineer for similar lands as a basis." If the county board shall refuse or dismiss the petition it must state its reasons in writing, and if in error a writ of mandamus may issue. (Sec. 3, L. 1917, 79.)

*Elections and electors.*—All persons (including corporations) who are owners of agricultural lands to which water has been allotted, are entitled to vote at all elections. Each elector is entitled to one vote for every acre foot of water or fraction thereof allotted to land owned by him, and must sign the ballot indicating the number of acre feet allotted to his lands. (Sec. 4, L. 1917, 80.) A majority of the votes cast is sufficient to organize a district. (Sec. 5, L. 1917, 81.)

*Powers of the board of directors.*—Among the powers of the board is that of purchasing the capital stock of mutual irrigation companies organized for the sole purpose of owning and operating irrigation systems, but the authority to purchase less than a majority of the capital stock is denied. In case of the purchase of rights and property, the bonds of the district may be used at their par value as may be most advantageous without previous offer of sale, but there is the prohibition (which exists also in several other States) against a contract over \$10,000 and not over \$25,000 being made without ratification by land owners. Still larger contracts require an election. (Sec. 11, L. 1917, 83.)

Power to lease or rent water not needed by the land owners or to contract for the delivery thereof to other lands within or without the district at not less than one and one-half times the district tax is given to the board.

*Assignment or lease of water.*—Individual land owners may assign their right to water apportioned for any one year to other land own-

ers, provided both parties have paid all assessments due. (Sec. 11, L. 1917, 85.)

The board may also lease water to occupants and entrymen of State and Federal land on the same terms and may contract with such persons for their inclusion in the district when title is obtained, provided that protest in writing on the part of a majority of the land owners shall vitiate the action taken. (Sec. 12, L. 1917, 86.)

*Evidence of organization.*—Certified copy of county commissioners' order of organization is prima facie evidence of the legal sufficiency of the proceedings under the act in any court of the State, and where any irrigation district has exercised the powers of a district through a de facto board, and its legality has not been questioned in quo warranto proceedings within one year after the date of the organization order, the district shall be conclusively deemed to have been legally organized. (Sec. 14, L. 1909, 152.)

*Bond issue.*—For the purposes of construction or purchase, for cooperation with the United States, or for the payment of interest upon bonds "during the period of construction and for not more than four years thereafter, and otherwise carrying out provisions of this act," the board of directors is required to make the necessary plans and estimates for an election upon a bond issue. At such an election a two-thirds majority is required of the votes cast to authorize the bonds. These, when issued, run for a period not to exceed 40 years, and at the expiration of 11 years and annually thereafter not less than 3 per cent of the whole number of bonds must be payable. It is expressly provided that if the proceeds of the bonds become exhausted additional bonds may be issued after favorable action at a special election, the same to have a lien subordinate to the previous bonds. (Sec. 15, L. 1917, 87.) They may bear interest at not exceeding 6 per cent per annum. (L. 1917, 88.)

If the proceeds of the bonds be insufficient, it is the duty of the board of directors to complete the construction plans by levy of assessments. (Sec. 25, L. 1917, 95.)

*Confirmation.*—Confirmation proceedings in the matter of a bond issue are discretionary. The statute is sufficiently broad to include confirmation of proceedings for the authorization of contract with the United States, and for the allowance and adjustment of assessments for lands under Federal contract where a partial prior water right existed. (Sec. 50, L. 1917, 99, and Sec. 19, par. 5; L. 1917, 91.) The decree may determine the validity of the contract with the United States. (Sec. 54, L. 1917, 101.)

*Sale or exchange of bonds.*—If no bid is received as the result of an advertised sale of bonds, the board may use the bonds for the purchase of canals, reservoirs, and other necessary property including the capital stock of mutual companies or for construction purposes at not less than 95 per cent of the face value. (Sec. 16, L. 1913, 198.)

*Annual assessment determined.*—The board of directors is required annually to determine the amount of money necessary for the ensuing year for district purposes, including the payment of assessments upon capital stock of mutual irrigation companies owned by the district. This amount, together with additional amounts necessary to meet any deficiency in the payment of expenses theretofore in-

curred, is certified to the county commissioners of the county wherein the office of the district is located. (Sec. 18, L. 1917, 89.)

*Basis of assessment.*—The county assessor of each county affected does the work of assessment, entering the assessment of all real estate to which water has been allotted, using the basis of the value per acre foot of water allotted, although the board of directors may divide the district into units and fix a different value per acre-foot in respective units, in which case the assessor shall use the same basis. (Sec. 19, L. 1917, p. 90.)

In case of contract with the United States, however, the assessment may be otherwise apportioned to accord with the Federal laws, and provision is made in the same event for the existence of a rental status for the lands, for postponement of certain charges by contract with the United States where exceptional difficulties exist, for the division of the project and the placing of the same upon a repayment basis in successive units, and for the granting of equitable credit to district lands previously irrigated with due consideration to the cost of the additional rights acquired under contract with the United States. After publication of notice, a meeting of the board is held for the purpose of adjusting the rights of such prior owners and making an allowance, which, when confirmed by the district court, becomes the basis of the assessment of such lands. (Id.)

No land which from any natural cause can not be irrigated or cultivated is liable for taxes for irrigation purposes. (Id.)

*Rates of levy.*—Immediately upon the receipt of the returns of the district assessments and the certificate of the board of directors showing the total amount of money required to be raised as herein provided, the county board must fix the rate of levy necessary to provide the above-described amount of money, including principal and interest on bonds, sums due the United States, and requirements for other purposes necessary to be raised by levy of assessment. Such rates are certified to the county commissioners of each county embracing any portion of the district, and must be increased 15 per cent to cover delinquencies. For the purposes of the district the county commissioners at the time of making the levy for county purposes must levy at the rates above specified upon all district real estate within their respective counties.

All taxes levied under the act are special taxes. (Sec. 20, L. 1917, 92.)

*Collection.*—The county treasurer of the county in which is located the office of the district is ex-officio district treasurer. He must collect all district taxes in the same manner and at the same time as taxes for county purposes, including both in the same receipt. (Sec. 21, L. 1917, 92.) Except as modified by the act, the revenue laws of the State are applicable, provided that lands are sold separately for delinquent district taxes; a separate certificate of sale is issued, and the period of redemption from sale is fixed at two years.

District taxes "constitute a first lien on the property assessed, which lien shall remain in force until the taxes are paid." (Sec. 22, L. 1917, 94.)

*General expenses.*—For organization, operation, and maintenance purposes, or for rental of water, tolls, and charges may be collected from water users or assessments may be levied, or both. (Sec. 25, L. 1917, 95.)

*Inclusion.*—Inclusion petition may be made by holders of title representing a majority of the acreage of lands to be included. The assent of the Secretary of the Interior is required where contract has been made with the United States. (Secs. 31 and 32, L. 1917, 96.)

*Exclusion.*—When there are no outstanding bonds and the majority of the landowners in the district do not protest in writing within 30 days, exclusion of lands may be ordered upon petition for the owners thereof. (Sec. 45, L. 1917, 98.) Such exclusion does not impair or discharge any contract, obligation, lien, or charge for which the district was or might become liable had the lands not been excluded. (Sec. 31, L. 1917, 96.) When contract has been made with the United States, lands shall not be excluded unless the Secretary of the Interior assent in writing. (Sec. 45, L. 1917, 98.)

*Dissolution.*—Petition for dissolution may be made to the board of directors by landowners representing a majority of the number of acre-feet of water. If satisfied that all claims and bills have been fully settled, the board calls an election. In the event contract has been made with the United States the board is without jurisdiction to consider such petition or to hold such an election until the Secretary of the Interior certifies that all payments and obligations to the United States have been fully paid or that the Secretary of the Interior consents to such dissolution. (Sec. 48, L. 1917, 98.) If an election be held, a majority of the votes cast is decisive. (Sec. 49, L. 1917, 99.)

*Public right to appropriate water suspended.*—The governor is authorized "for the purpose of preserving the surplus and unappropriated waters of any stream or other source of water supply for use by irrigation districts" upon recommendation of the State engineer, to suspend the public right of appropriation of water for a period not exceeding five years. (Sec. 54x, L. 1917, 101.)

#### WASHINGTON.<sup>1</sup>

The Washington law will be found in Remington's 1915 Codes and Statutes of Washington, sections 6416 to 6512, as amended by the Session Laws of 1917, chapter 162, page 723.

*Petition for organization.*—Fifty or a majority of the holders of title, or evidence of title, to lands susceptible of irrigation, irrespective of the acreage which they represent, may petition the county commissioners for organization of an irrigation district.

*Purposes.*—The objects of organization are not only provision for the construction of works, but also the reconstruction, betterment, extension, purchase, operation, or maintenance of works already constructed or the assumption as principal or guarantor of indebtedness on account of district lands to the United States under the Federal reclamation laws. (Sec. 6416 as amended L. 1917, 723.)

*Lands which may be included.*—The county board in determining the lands to be included, is not restricted to lands obtaining a new water supply or even lands that are proposed to be irrigated. It is sufficient if the lands are benefited, and town and city lots may be

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 171, for 1919 amendments.



included and assessed. (Sec. 6417; also Sec. 6433 as amended L. 1917, 729.)

Lands having a partial or full water right when included in any district must be given "equitable credit therefor in the apportionment of the assessments in this act provided." (Sec. 6417.)

*Organization election.*—After the hearing and settlement of the boundaries of the district and due notice given of election for organization, two-thirds of all the ballots cast must be favorable for organization to prevail.

*Electors.*—Any person of the age of 21 years, being a citizen of the United States and the State of Washington, holding title, or evidence of title, to land embraced within the district, may vote. Additional qualifications for voting required by the general election laws are not applicable. Where title to community property is held by husband and wife, both may vote. A corporation may vote by its duly authorized agent upon filing with the election officers a written instrument showing his authority. (Sec. 6418 as amended L. 1917, 724.)

*Condemnation.*—Condemnation proceedings are governed by the laws applicable to condemnation by private corporation. The court may consolidate separate suits for condemnation of rights of way into a single action, a separate finding of the court or jury being required as to each separate tract. (Sec. 6427.)

The right of eminent domain for the construction of works across streams, highways, etc., is given and right of way over State lands is dedicated for district purposes. (Sec. 6453.)

*Bond or contract election.*—The bond election or election upon contract with the United States requires only a majority of the votes cast.

*Bond issue.*—Alternative plans for issue of bonds are offered. The bonds may run for 20 years, installments upon the principal beginning at the expiration of 11 years, or they may be issued to run for 40 years. (Sec. 6432-1.) Provision is made, in case the moneys thus raised are insufficient, for the calling of a second bond election or for the completion of the plans by the levy of assessments without bonds. It may be stipulated in the bonds that no interest shall be paid during the first three years after date of issue, and that in lieu thereof the rate of interest shall be increased for a succeeding period of years; but in no case shall the aggregate of interest paid on the principal exceed an average of 6 per cent during the entire life of the bonds. (Sec. 6430 as amended L. 1917, 726.)

*Sale of bonds.*—Bonds may be sold at public or private sale in the discretion of the board or exchanged for labor and materials necessary for construction, but they may not be sold or exchanged for less than 90 per cent of their face value. (Sec. 6431.)

*Bonds a lien upon the land.*—Bonds and payments to the United States shall be paid by revenue derived from an annual assessment upon the real property of the district and all such real property shall be and remain liable to be assessed for such payments. The bonds or Federal contract obligations become a lien upon all the water rights and other property acquired by any irrigation district and upon its waterways, reservoirs, machinery, and improvements. If default be made in the payment of the principal or interest, the holders of the bonds, or the United States, as the case may be, may

take possession of the property of the district and control the same, enjoy the rents, issues, and profits until the lien created can be enforced by suit as in the case of foreclosure of mortgage on real estate. (Sec. 6432.)

*Assessments.*—Assessments were formerly upon the ad valorem rule of California, but in 1915 (L. 1915, 520) Washington adopted the benefit basis of assessment with the proviso "that nothing herein shall be construed to affect or impair the obligation of any existing contract providing for a water supply to lands so assessed, unless the rights under such contract shall first have been acquired by said district, and in acquiring such rights the district may exercise the right of eminent domain." The secretary must prepare an assessment book with all lands listed, showing the ratio of benefits and reference to any water-supply contracts. Any property which may have escaped assessment for any year shall, in addition to the assessment for the then current year, be assessed for such prior year in the same manner as for the current year. (Sec. 6433 as amended by L. 1917, 729.)

The assessment becomes a lien upon the real property annually on a specified date, but as between grantor and grantee does not attach until a later date. Such lien is paramount to any lien theretofore or thereafter created, whether by mortgage or otherwise, except for prior assessments and general taxes, and such lien shall not be removed until the assessments are paid or the property sold under the law. (Sec. 6438.)

*Equalization.*—After completing his assessment book, the secretary delivers it to the board, which, upon due notice, meets as a board of equalization. (Secs. 6435 and 6436.)

*Levy.*—The directors then levy an assessment sufficient to raise the annual interest on the bonds, increasing the amount thereof in ensuing years so as to discharge the bonds as they mature or to raise the payments to the United States. Similar assessment and levy must be made for the expense fund, including operation and maintenance costs. Special funds are provided and the assessments are collected by the county treasurer.

*Neglect of duty by officers.*—In case the board of directors fails to cause assessment or levy or the equalization thereof to be made, the duty of performing these acts devolves upon the board of county commissioners of the county where the office of the board is located. The treasurer of such county, in case of the neglect of the secretary of the board to act, must perform his duties. (Sec. 6437.)

*Payment of assessments.*—The secretary must deliver the assessment book to the county treasurer of the county in which the office of the board of directors is situated, and after notice taxes become delinquent on the date specified, unless 60 per cent of the taxes have been paid. If 60 per cent be paid, the remaining 40 per cent shall not become delinquent, except as a second installment and at a later date. In the case of districts comprising lands obligated to the United States under the Federal laws, the notice as to the date of delinquency shall state that assessments against lands in connection with such obligations will become delinquent at the times and in accordance with the provisions of the Federal laws. (Sec. 6439 as amended by L. 1917, 731.)

*Publication of delinquency lists.*—The county treasurer must publish the delinquency list twice each year, at the times when the two respective installments become delinquent. Publication of delinquency lists on amounts due the United States are begun at a later date and delinquent payments bear interest and penalties in accordance with the Federal law. (Sec. 6440 as amended by L. 1917 732.)

*Tax sale.*—The landowner, or, on his failure to do so, the county treasurer, may designate the portion of any tract to be sold first at any delinquent tax sale, only so much as is necessary to pay the assessment and costs if sold. If there be no purchaser, the whole amount of the property is struck off to the irrigation district, which has the same rights as a private purchaser. Authority to convey such land must be confirmed by resolution of the board fixing the price not less than the reasonable market value of the land. (Sec. 6442.)

Redemption of the property may be made within two years from the date of purchase. (Sec. 6444 as amended L. 1917, 733.)

*Redemption of bonds.*—Whenever, after 10 years from the issuance of bonds, there shall be \$10,000 in the bond fund, the board may advertise for bids and apply said sum to the redemption of the bonds at the lowest price bid, but not in any event at more than par. (Sec. 6449.)

*Bids for construction work.*—The usual clause requiring public advertisement for bids for construction work is declared not to apply to cases where the board is authorized to exchange bonds for labor and material, or to contracts with the United States. (Sec. 6450.)

*General expenses.*—To defray the expenses or organization, operation, and maintenance, tolls and charges for water service may be imposed or assessments may be levied, or both. (Sec. 6452.)

*Special assessments.*—Special assessments may be levied for raising additional moneys for the purposes of the act, an election carried by a majority of the votes cast being necessary. Fifteen per cent for delinquencies must be added to the whole amount required. (Sec. 6456.)

*Limitation of indebtedness.*—To the standard prohibition against the incurring of debts not expressly authorized there is added a proviso that the board may incur a debt for necessary engineering investigation of the feasibility of the project not to exceed 25 cents per acre. Moreover, in case of emergency the board may incur a debt not more than 15 per cent of the total rates, tolls, charges, and assessments for the current year for operation, maintenance, and improvement of the works, and may cause warrants to issue therefor. The amount of the warrants shall be included in the next annual levy for maintenance. (Sec. 6457 as amended L. 1917, 735.)

*Local improvement districts.*—The comprehensive and excellent Washington plan for local improvement districts within irrigation districts has been outlined in the general discussion. (See supra, p. 76.)

*Inclusion of lands.*—The boundaries of the district may be changed, but if contract has been made with the United States, the Secretary of the Interior must assent in writing. (Sec. 6462.) Petition for the annexation of lands may be made by the holders of title represent-

ing one-half or more of a body of contiguous lands adjacent to the irrigation district. (Sec. 6463.)

The provisions are normal; the election, if one is required by the development of the proceedings, requiring a majority of those voting. (Secs. 6464 to 6473.)

*Exclusion of lands.*—The exclusion of lands from the district requires that the holders of any outstanding bonds, or the Secretary of the Interior in case of contract with the United States, shall give assent in writing, which is filed with the board of directors. If assent is not filed, the board must dismiss the petition. (Sec. 6480.) Even though such assent is filed, if there are objections showing sufficient cause an election must determine, by a majority of the votes cast, the question of the proposed exclusion. (Secs. 6481 and 6482.)

*Confirmation.*—Proceedings in confirmation are discretionary with the directors. They may be initiated to determine the validity of bond issues and the authorization of contracts with the United States, including matters relating to local improvement districts. The provisions are substantially as in other States. (L. 1917, 741 to 743; secs. 6492 and 6494.)

*Dissolution—Where no outstanding bonds.*—Irrigation districts may be disorganized and their affairs liquidated in case there is no bonded indebtedness outstanding (6495) in the following manner: Petition therefor must be signed by one-third or more of the holders of title who are qualified electors of the district and delivered to the board of directors. (Sec. 6496.) At the election ensuing a three-fifths majority must favor the dissolution, whereupon the board of directors presents to the superior judge of the county an application for an order of dissolution. A sworn statement by the directors must be filed showing the outstanding indebtedness of the district or that there is no such indebtedness. The order is entered if the court, upon consideration, find compliance with the law. (Sec. 6498.)

Upon such dissolution the board of directors "shall be trustees of the creditors and of the property holders of said district for the purpose of collecting and paying all indebtedness of said district, in which actual construction work has been done, and shall have the power to sue and be sued? The board must levy and collect a tax sufficient to pay all debts, the same to be levied and collected as prescribed in general for taxes of irrigation districts. Any balance after the debts and costs have been paid is refunded in proportion to the contribution by each assessment payer. (Sec. 6499.)

*Dissolution—Where bonds are outstanding.*—If, however, there are bonds of the district outstanding, the dissolution proceedings can only be commenced with the written consent, duly acknowledged, of two-thirds in amount of the holders of all such bonds, which consent must be filed with the county auditor. (Sec. 6501.) Then a petition on the part of one-third of the qualified electors praying that the district be dissolved shall be filed with the county auditor. (Sec. 6502.) The board of county commissioners calls an election upon the dissolution which requires a majority of the votes cast. (Secs. 6503 and 6505.)

The books and records of the district are then delivered to the county auditor, who certifies to the county clerk a transcript of the

proceedings before the county board and a statement of the indebtedness of the district as it appears from the records. (Sec. 6506.)

The proceeding is then docketed in the superior court and notice for the filing of all claims is given. The court proceeds to determine the validity of claims against the district which have not been barred by the statute of limitations. (Secs. 6507 and 6508.) From the resulting judgment appeal may be taken. If not, a master is appointed who must give notice of the sale of the rights and franchises of the district not including, however, any property which has been sold for taxes or assessments.

The sale is of the same description as that of real property on execution. "Such master is authorized to receive in payment of the purchase price any securities or obligations of such district, the validity of which has been established by the previous judgment of the court, as herein provided; such securities or obligations are to be accepted at their face value and no bids shall be accepted, and no sale of said property shall be made for a less sum than the amount of bonded indebtedness of such district, including all accrued interest." (Sec. 6509.)

The return of the master is filed with the court, which confirms the sale if satisfied that it has been fairly conducted. Deed or conveyance is then delivered by the master to the purchaser. (Sec. 6510.)

As soon as such sale is confirmed, the county commissioners levy an assessment to liquidate "all outstanding indebtedness of such district, exclusive of the bonded indebtedness herein provided, on all the property within the district, subject to assessment under the general irrigation district laws of the State, which indebtedness shall be ascertained by reference to the judgment of the court as herein provided."

In levying such assessments the county board is governed by the general irrigation district laws, except as otherwise specifically provided. The county assessor under the direction of the county board prepares an assessment roll of the lands of the district from the last assessment roll of the county for State and county taxes. The board then equalizes the same after notice in the same manner as directors of irrigation districts are required to do. The county auditor performs the same duties as under normal circumstances would devolve on the secretary of the district. In all other respects such tax is collected as under the general irrigation district laws. (Sec. 6511.)

As soon as the sale is confirmed the court makes an order dissolving the irrigation district. This is recorded in the office of the county auditor and the district ceases to exist except for the purpose of collection of its indebtedness, all papers being turned over to the county auditor and the bonds and other obligations canceled as soon as paid. (Sec. 6512.)

#### WYOMING.<sup>1</sup>

The Wyoming law will be found as chapter 72 of the laws of 1907 and in the Wyoming Compiled Statutes of 1910, sections 829 to 873, inclusive, as amended by Laws, 1911, chapters 31 and 99.

<sup>1</sup> See p. 87 for the purpose and scope of this discussion. See also Addenda, p. 172, for 1919 amendments.

*Petition for organization.*—Organization is begun in Wyoming by petition to the board of county commissioners on the part of a majority of the freeholders within the district owning a majority of the acreage belonging to the freeholders within the district. (Sec. 831.)

*Lands exempted.*—Where irrigation works have been constructed or contracted for prior to the passage of the act, the lands thereunder are exempt from the act unless the district be formed to acquire, lease, or rent the works and their franchises with the consent of the owners. (Sec. 829.)

The act does not apply to lands which have been brought under the Carey Act of Congress "nor to lands and the owners thereof situated under and susceptible of irrigation from any system of reservoirs, ditches, or canals for which water-right permits have been granted, or shall hereafter be granted, by the State engineer to persons or corporations who propose the construction of reservoirs, ditches, or canals for the irrigation of the lands susceptible of irrigation therefrom." (Sec. 873.) The meaning of this provision is not apparent, but it probably would be construed to prevent the automatic application of the act to irrigated lands whose owners do not take steps for organization under the act.

No land may be included in the district if the owner thereof shall make application at the hearing before the county commissioners to withdraw the same. (Sec. 832.) This is regarded as a serious defect in the law, as it makes organization an entirely voluntary affair as regards each individual tract and opens the way to what is known as the "spotted" or "checkerboard" project. Any owner who desires to withdraw and allow the irrigation system to be built, finding it inconvenient to improve his land or hoping at a later date to be able to dispose of his land at a higher price, may withhold his support from this public improvement.

*Purposes.*—The purposes of organization include not only provision for irrigation (sec. 829), but also for improving the water supply, as well as for the repair and maintenance of irrigation works after they have reverted to the landowners from the original person or corporation undertaking the project. (Sec. 873.)

*Electors and elections.*—Qualified electors are defined as citizens of the United States or those who may have declared their intention to become such. As regards voting upon the organization of the district, or for the first board of directors, or for the issuance of bonds, or upon contracts in excess of \$25,000, an elector residing outside of Wyoming or more than 10 miles beyond the exterior boundaries of the district may vote without being personally present, by the mailing of an affidavit which states his qualifications as an elector and also serves the purpose of a ballot. (L. 1911, 162.)

All persons who are both freeholders and qualified electors within the district and who have paid a property tax in the proposed district during the preceding year are entitled to vote at the organization and other elections. (Sec. 832.) Elections are conducted as nearly as practicable under the election laws of the State. (Sec. 833.) A majority of the votes cast at elections determines the questions presented.



*Report of State engineer.*—The State engineer is required, as regards the origin of the district, to make report as to the feasibility and probable cost of the irrigation system, this report to accompany the petition. (Sec. 831.)

*Action on petition.*—If the county board denies the petition or dismisses the same it is required to state the reasons in writing, and if the same are not well founded a writ of mandamus is issued, which must be heard within 20 days. (Sec. 832.)

*Contracts.*—Contracts involving a consideration exceeding \$10,000 and not exceeding \$25,000 are not binding unless authorized in writing by not less than one-third of the legal electors of the district according to the number of votes cast at the last district election. Contracts exceeding \$25,000 require an election. (Sec. 839.)

*Water apportioned pro rata.*—Water is apportioned to the landowner "pro rata to the lands assessed." The board has the power to lease the use of water at its discretion, the rental not to be less than one and one-half times the amount of the district tax which would be required if the land were held as a freehold within the district. A landowner, provided he has paid in full all assessments, may assign the water apportioned to him or a part thereof for any year to any other bona fide landowner in the district. (Sec. 839.)

*Evidence of legal existence.*—Judicial notice is taken of the existence of irrigation districts after they have filed for record a certified copy of the county commissioners' order defining their boundaries. Where any such district has exercised its appropriate functions and the legality of its organization has not been questioned by proceedings in quo warranto within one year from the date of the filing of the order, it is conclusively deemed to be a legally established district and its lawful formation can not be questioned in any subsequent suit or proceeding. (Sec. 842.)

*Bonds.*—For purposes of construction and the acquisition of property and rights and to pay the first year's interest upon the bonds, the board of directors is required to call an election upon a bond issue. Plans of the proposed irrigation system, however, must first be submitted to the State engineer and his written approval obtained. The bonds when issued run for 20 years, the payments upon the principal beginning at the expiration of 11 years. A majority of the electors, however, may provide for the issuance of bonds maturing earlier than at the end of 20 years. Interest is limited to 6 per cent per annum. (Sec. 843.)

When funds derived from any previous bond issue have been exhausted by authorized expenditures and the board deems it necessary to raise additional money, another special election is required to be held. The taxes for the later bond issue constitute a lien subordinate to that of any prior issue. (Sec. 843.) Bonds may be sold at a price not less than 90 per cent of the face value. (L. 1911, 44.)

*Assessment and levy.*—"Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided." (Sec. 845.)

The machinery for taxation may be summarized as follows: The board of directors is required each year to determine the amount of money required to meet the maintenance, operating and current expenses, and any deficiency in the payment of such expenses previously incurred and to certify said amount to the county commissioners (Sec. 846.) Then the county board at the time provided for making the tax levy for county purposes or immediately upon the receipt of the returns of the total assessment of the district must fix the rate of levy necessary to provide the required amount of money, including principal and interest upon the bonds, and for other purposes. These rates are certified to the county commissioners of each county embracing any part of the district and are increased 15 per cent to cover delinquencies. A levy at such rates is then made upon all real estate of the district in connection with the levy for county purposes. The taxes under the district law are special taxes, (Sec. 847.)

Each county assessor is required to assess all real estate, exclusive of improvements, situate in the irrigation district within his county and to make returns of the total amount of such assessment to the county commissioners of the county where the district office is located. The lands are valued at the same rate per acre, but no land is taxed which can not be irrigated and cultivated. (Sec. 848.)

*Treasurer.*—The county treasurer of the county where the district office is located is ex-officio district treasurer. The revenue laws for assessment, levy, and collection of taxes on real estate for county purposes, except as expressly modified, are applicable, including penalties and forfeitures for delinquencies (Sec. 850.)

*General expenses.*—Organization, operation, maintenance, and improvement expenses may be paid by means of tolls and charges upon water users or by the levy of assessments, or by both tolls and assessments. In case the proceeds of the sale of bonds be insufficient and bonds be unavailable for completion of the plans of works adopted, the board of directors are required to provide for completion by the levy of assessments. (Sec. 853.)

*Limitation on indebtedness.*—Any debt or liability incurred by the district in excess of that expressly authorized by law is absolutely void. (Sec. 855.)

*Inclusion of lands.*—Petition for the inclusion of lands within a district may be made by holders of title representing a majority of the acreage of the land proposed to be included (sec. 859), but the board in acting on the petition must not include in the district "lands of any owner or owners objecting thereto." The proceedings are of the usual type, it being provided that protest against the inclusion of lands on the part of a majority of the qualified electors of the district shall vitiate the inclusion proceedings. (Sec. 863.)

*Exclusion of lands.*—The exclusion proceedings are of the customary type, with the express provision that the exclusion shall not "effect, impair, or discharge any contract, obligation, lien, or charge for or upon which such land would or might have become liable or chargeable had such land not been excluded from the district" (867). There is no provision requiring the consent of bondholders or creditors as a prerequisite to an exclusion order.

*Dissolution.*—Petition for dissolution may be presented to the board of directors by a majority of the freeholders representing the majority of the number of acres of irrigable land. The petition must state that all bills and claims against the district have been fully satisfied and paid. The board is required to satisfy itself that such is the fact before calling an election upon the dissolution. (Sec. 868.)

*Confirmation.*—Proceedings in confirmation for determining the validity of the organization and of the issue and sale of bonds are discretionary with the board. The general provisions follow the customary form. (Secs. 870, 871, 872.)

## ADDENDA.

### CHANGES IN 1919.

#### PROVISIONS IN LAWS OF 1919.<sup>1</sup>

*Arizona.*—The distinction between general electors and qualified electors for bond issues and special assessments has been done away. An elector is one who has held title or evidence of title for 90 days and has been a resident for six months. (Ch. 157, pp. 261-264.) The same act has also supplied an alternative as regards the period that bonds run where the per acre debt does not exceed \$30.

*California.*—Full authority for the construction and maintenance of electrical power works with the privilege of selling power to municipal and private corporations and persons is granted by chapter 370, page 779, and the right to appropriate water and to issue bonds therefor is declared. These powers are not made subordinate to or rendered of a character purely incidental to irrigation. It appears that the district has the right to embark upon the development of power irrespective of any needs for pumping to any district lands. Express provision for assessment to carry out contracts for power for the irrigation of district lands has been made by chapter 291, page 472, amending section 39 of the law of 1897.

Broad powers have been given to the board of directors to contract with the United States or any State, county, district of any kind, public or private corporation, association, firm or individual, for the joint acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any property of a kind which might lawfully be owned by an irrigation district by chapter 339, pages 660-669. The right is also given to store water in any reservoir or to carry water through a conduit which is not the property of the district.

The same statute amends section 18 of the act of 1897 modifying the rule for the apportionment of water according to the charges paid, in the case of revenue secured by tolls and charges. In such cases equitable distribution is adopted as the basis of apportionment. (Sec. 3.) It is now allowable for the estimates for bond issues to include a sum sufficient to pay interest on bonds for an initial three-year period (Id. sec. 4), provided the plan be approved (sec. 5) by the bond certifying commission. (See p. 43 above.) The petition for a bond election, described on page 94 above, is now necessary only when the directors omit to direct an election (Id. sec. 7, amending sec. 30-c). If the directors act of their own initiative a two-thirds majority of the votes cast at the election must favor the bond issue, but if the petition shall have been presented, as contrasted with independent action by the board, a bare majority of the votes cast is sufficient to authorize the bonds (Id. sec. 8).

<sup>1</sup> The States of Kansas, North Dakota, Oklahoma, South Dakota, and Texas made no changes in 1919.

Chapter 489, page 1004, makes provision for the issuance of refunding bonds which may be authorized by a majority vote and may be issued under the usual circumstances and safeguards.

Alternative plans for the dissolution of California irrigation districts have been outlined above (p. 100). Two additional and alternative methods have been incorporated into the law by chapter 356, pages 751-752. These are: (a) Where the district has been organized over three years and has failed to secure adequate water supply, is without reasonable prospect of doing so and has failed to obtain the approval of the State water commission, the State engineer, and the irrigation district bond commission and has not secured irrigation works; and (b) where the district has been organized for over 10 years and for over 5 years after securing irrigation works has failed to maintain the same and to supply water to over 10 per cent of its irrigable lands. Proceedings in both these cases are before the superior court. County officers in lieu of district officers levy and assess in sufficient sums to secure the payment of outstanding debts "not provided for by previous assessment." Whether the word "provided" means so far taken care of, against possible delinquency, as to have resulted or proved likely to result in funds sufficient to pay the obligations of the district may be a matter for judicial interpretation.

*Colorado.*—Cooperation with the United States in Colorado has now been authorized not merely under the reclamation law, but under any act of Congress (ch. 142, pp. 469-475). The same statute makes a provision novel in irrigation district law in condemnation proceedings. Where the awards in condemnation exceed \$25,000 sufficient time must be accorded by the courts to permit of an election to determine whether the property shall be acquired, and, if the electors authorize payment, further time is to be given for assessment to meet the award.

An alternative method for dissolution is provided in addition to those already authorized. Whenever for five successive years a district has failed to transact business for which it was formed, or has failed to keep up its organization or to appropriate water upon district lands, it may be dissolved upon petition by any five electors addressed to the district court. Notice is given requiring the owners and creditors to appear and show cause why dissolution should not be granted. Service is had personally or by publication. The proceedings are in rem and the court has power to order district property sold for the benefit of creditors and to provide for the payment of all district debts by such sales or by flat rate assessment. The law does not seem to deprive the court of jurisdiction under the circumstances named to dissolve the district without providing for payment in full. Individual landowners can discharge their lands from all district liabilities by making payment of such assessment as may be made against their lands. (Chs. 476-480.)

Colorado has enacted a rather novel drainage law. Two-thirds of the voters of the district, each of whom owns five acres or more, and has paid in full his irrigation district taxes, may petition for drainage, whereupon the district officers have the same powers for drainage purposes as they are given by law for irrigation to the extent that the drainage is necessitated by irrigation carried on pursuant to irrigation district laws. Preferential right is given to

the district in waters flowing in or collected and conveyed by drainage works constructed in the lands of the district. Lands drained are to be reinstated upon the tax roll and lands lying outside of the district which are benefited by drainage may be assessed for irrigation and drainage purposes and required to meet a proportion of the irrigation district bonded indebtedness and of the costs of drainage. (Ch. 144, pp. 481, 482.)

*Idaho.*—Detailed procedure relative to foreclosure of irrigation district liens is provided by chapter 61, pages 192-195.

An almost complete substitute for the former statute governing the consolidation of two or more irrigation districts has been furnished by chapter 120, pages 405-407. Where the smaller district is not more than one-tenth of the larger district consolidation is initiated by the preparation of a contract draft, followed by an election by the smaller irrigation district electors, which must carry by two-thirds vote. There is then a petition to the larger district, which proceeds in the same way as in the ordinary petition for the annexation of lands to the district. The procedure must be confirmed in the courts.

The statute providing for dissolution set forth above (p. 113) has been modified to provide parallel methods for the transfer of water rights and canal system of an irrigation district. (Ch. 36, pp. 132-135.) Other amendatory provisions will be found as follows: Chapter 16, pages 79-80; chapter 141, page 436; chapter 115, pages 401, 402, and chapter 15, page 78.

*Montana.*—This State has enacted an additional statute for the exclusion of such areas as from their location or conformation can not be successfully irrigated by the district or the cost of irrigating which will become burdensome to the landowners of the district. Petition to the district court for exclusion must be signed by a majority in number of the holders of the land included in the district representing a majority of the acreage thereof. Notice of hearing is given and the court is authorized to make the change of boundaries requested.

Dissolution of an irrigation district is provided by section 3 of the same law (p. 172). Whenever a district has failed to secure an irrigation system and all indebtedness of the district has been paid, dissolution may be granted by the district court upon a petition signed by the same number of holders of land as are required in case of a petition for organization. The court must, however, find that all indebtedness has been discharged.

Cooperation is now authorized with the United States not merely under the reclamation act but under any act of Congress. Recognition of drainage work by irrigation districts has been made more comprehensive and the features with reference to the apportionment of assessments in 40-acre subdivisions and providing for relief from further assessment which were objected to above (see p. 57) have been eliminated by chapter 116, pages 235-245.

At the extraordinary session of 1919 an irrigation district law, so called, was enacted authorizing the Montana irrigation commission to perform many fundamentally important functions in connection with such districts. The type of district resulting is not a form of self-governing local municipality and for such reason, interesting as the law undoubtedly is, it falls somewhat outside of the



scope of the present work. (Ch. 14, p. 40, extraordinary session, 1919.)

*Nebraska.*—Changes as to minutia in the work of collection and in the duties of the county treasurer as ex officio district treasurer have been made by chapter 110, pages 269–272. The law has also been amended by chapter 111, page 273.

*Nevada.*—This State has enacted a complete substitute irrigation district law in chapter 64, pages 84 to 115. This act makes many changes in the previous law, most of which are of a minor character. Bonds mature serially, but shall not run for more than 20 years and may draw interest at not exceeding 6 per cent per annum. (L. 1919, 93.) The provisions for cooperation with the United States are removed from individual sections throughout the act and combined, much as in the case of a separate act for such purpose in California, in several sections. (Secs. 55 to 65, pp. 108 to 114.)

The undemocratic method of voting criticized above (see p. 127) has been abrogated by the new law and any person, male or female, 21 years of age or over, whether a resident of the district or not, who is, or has declared his intention to become, a citizen of the United States and who is a bona fide holder of title, or evidence of title, is an elector of the district and is entitled to but one vote. (Sec. 8, p. 89.)

The assessment provisions above referred to (p. 128) have been combined with a provision that the benefits from undertakings for which special assessments are made may either be distributed equally over the lands or especially apportioned when such course is authorized in the election therefor. It is also provided that either assessments or tolls, in so far as imposed for operation and maintenance, may be chargeable by way of a minimum stated charge per acre whether the water is used or not, with an excess charge for use of water above the amount delivered at the minimum rate. (Sec. 17, p. 94.)

It is provided that where drainage works are to be constructed benefits may be apportioned to higher lands not then actually requiring drainage "by reason of the fact that their irrigation contributes water which must be carried off or away from lower lands." (Id. p. 95.)

Chapter 188 has provided for cooperation by agreement with adjoining irrigation districts in other States for joint construction, acquisition, and management of irrigation or drainage works. The agreements may provide for joint or several ownership or ownership in common of the necessary property (p. 338).

*New Mexico.*—This State has created two classes of irrigation districts by 1919 statutes. One comprising districts not cooperating with the United States, and the other districts formed to cooperate with the Federal Government. Both statutes run along lines similar to those of the previous law (pp. 130 to 135). They constitute a complete substitute for the former law.

Referring first to chapter 41 which relates to irrigation districts in general:

The clauses expressly giving the authority to develop power and permitting the promotion of agricultural resources and market facilities (see p. 131) have been omitted (sec. 1, p. 91). There has been a slight change in the phraseology as to the acreage which must be

represented on the petition for organization. The former requirement was that the area represented must be a majority of the acres belonging to resident freeholders (including entrymen), whereas the new law requires a majority of the total acreage within the district. References to the Smith Act have been eliminated from this law, possibly with the erroneous view that this act (see ante p. 23 to 24) related only to districts which cooperated with the United States. Other districts, however, have the same privilege of including unentered public lands under the Smith Act, and the State statute for irrigation districts in general might best refer thereto. The change of phraseology would make it difficult to organize wherever the area of unentered public land is considerable.

The statute also gives the vote to corporations and associations. (Sec. 3, pp. 92, 93.)

Organization for this class of districts is authorized if two-thirds of the qualified electors actually voting at the election favor the district. This is an easier requirement than that before imposed. The plan for mailing ballots (see p. 132) is omitted. Secs. 5 and 6, pp. 94 and 95.)

These districts have been authorized to construct drainage works and to issue bonds for such purpose without previous offer of the same for sale, but no contract for more than \$10,000 or involving annual payments exceeding \$15,000 is binding unless authorized by written consent of a majority of the electors of the district according to the vote cast at the last election. Contracts in excess of \$25,000 per annum require an election. (Sec. 12, p. 99.)

The requirement for the authorization of bonds is higher than in most States. A majority of the qualified electors must vote favorably. (Sec. 15, p. 101.) Refunding bonds are now expressly provided for. (Sec. 16, p. 103.)

Turning now to the act authorizing districts to cooperate with the United States:

The very high requirement at the election for organization outlined above (p. 131), together with the plan for receiving mailed ballots, has been retained. (Sec. 6, pp. 33 to 33.)

The board of directors estimates for assessments for all purposes, with allowance for earlier deficiencies. Not less than one-fourth nor more than two-thirds of the operation and maintenance costs shall be collected by assessment upon all district lands unless exempt, whether irrigated or not, and the remainder of the operation and maintenance funds is collected from the landowners actually using water. Lands which are unfit for cultivation on account of seepage or other conditions are not taxable for bonded indebtedness or for operation charges, and whether such tracts are taxable for payments to the United States is dependent upon the directors or the Secretary of the Interior or may be provided by contract. It is provided, however, that payment in full to all creditors of district indebtedness shall be made irrespective of all exemptions unless otherwise provided by agreement. (Sec. 21, pp. 44 to 47.)

Districts organized under the general law may come under this law after contract has been made for cooperation with the United States. (Sec. 59, p. 62.)

*Oregon.*—Irrigation districts may turn over to the Federal Government lands owned or controlled by the district for the purpose of

having the same developed and colonized by any agency of the United States, and assessments for repayment to the Government of the amounts expended with interest not to exceed 6 per cent may be levied. (Ch. 146, p. 203.) To carry out this plan any irrigation district may accept from a landowner title to part of his holdings and allow reasonable credit therefor upon the reclamation charge against the remaining portion retained by such owner, but no credit shall be allowed great enough to entirely extinguish the reclamation charge against any land in the district, and this feature of the law is dependent upon a contract with the United States for the development of the lands having first been executed.

The assessment methods have been modified by provision for the division of the district into units and apportionment in accordance with units. Prior to the completion of the works assessment may be made as appears equitable to the directors subject to the right of district landowners to require adjustment by the board of equalization and subject to appeal. Reclamation and assessment by units must first be approved by the State engineer. (Ch. 146, p. 204.)

Property acquired by any district no longer necessary for district purposes may be sold either at private or public sale and the district officers are authorized to make conveyance. (Ch. 138, p. 193.)

The provisions for the confirmation of bond issues and other proceedings have been reworked and made applicable also to drainage districts without very material change having been made. (Ch. 390, pp. 693, 694.)

The procedure for the certification of irrigation district bonds has been broadened so as to include drainage district bonds and the entire statute for such purpose enacted anew. (Ch. 305, pp. 554-558.)

*Utah.*—This State has passed a complete irrigation district act, constituting a substitute for previous laws, in the enactment of chapter 68 (pp. 204-241), without having modified the former law as amended in 1917 (see p. 151) in any very radical way. The following will outline the most important departures:

The authority to lease water to occupants of public lands (see p. 153) has been omitted from the 1919 act.

More than ordinarily complete provision has been made for the procedure in connection with irrigation district warrants and the mode of providing for current incidental expenses. Negotiable notes of the district are authorized to be issued for current expenses. (Sec. 23, p. 226.)

The new law has also revived the usual prohibition of excess liability (see p. 34) with the addition of a clause authorizing warrants or notes for certain expenditures. (Sec. 26, p. 227.) Provisions for changes in boundaries have been made more comprehensive. (Secs. 29 to 44, pp. 228-232.)

Provision has been made for the transfer of water rights and other property after notice where consent of the creditors is given unless one-third of the water-right owners protest. (Sec. 53, p. 235.) Irrigation district bonds and other securities are exempted from taxation within the State. (Sec. 54, p. 236.)

State lands may be included in districts upon petition of the State board of land commissioners, but are not subject to taxation while held by the State, but contract between the State and the district

boards may provide for annual payment for district expenditures, a water right being thus secured for State lands. (Sec. 55, p. 236.)

Utah has provided for local improvement districts in comprehensive manner. (Secs. 56-63, pp. 236-240.) The holders of title or evidence of title to one-fourth of the acreage proposed to be assessed for any special or local improvement may file a petition with the directors. An investigation follows, and if the cost of the proposed local work be excessive or the security insufficient, or a protest signed by a majority of the holders within the proposed local district be filed, the board must dismiss the petition. If the contrary appears, hearing is had after due notice, the boundaries of the local improvement district are settled, and the work proceeds. If, however, the cost is to exceed \$10,000 and is less than \$25,000, written authorization must be made by a majority of the holders within the local district. If the cost is to exceed the latter figure, two-thirds of the holders within the local improvement district must ratify, but in such case if a majority of the voting electors of the district at large, according to the votes cast at the last election, protest in writing within 30 days after the completion of the notice, the work shall not be undertaken.

The cost of the improvement is paid by warrants of the district bearing interest not to exceed 7 per cent. (Secs. 57, 58, pp. 237, 238.) The directors assess the benefits and award damages, and the county commissioners act as a board of equalization upon local improvement district benefits. Assessments are made and levied in accordance therewith. Districts may contract with the United States for local improvement work, and confirmation is provided in the case of indebtedness for such purposes in the same manner as in other cases. (Sec. 63, p. 239.)

If after the district has become indebted it shall become insolvent and fail to maintain its organization, and for more than two years shall fail to pay its bonded or other indebtedness, the district court shall, under its equity powers, have jurisdiction to appoint a commissioner to take charge of the property of the district and to sell and dispose of the same for the benefit of creditors and close up the affairs of the district under the direction of the court. (Sec. 64, p. 240.)

*Washington.*—Chapter 180, pages 527 to 554, has made several important changes in the Washington law.

State lands have been rendered subject to the provisions of the irrigation district law upon the consent of the commissioner of public lands, if he shall find that the same will be benefited by inclusion in the district and shall assent thereto in writing. State lands thus included are not to be sold for delinquent assessments, but the amount is charged to the lands benefited and, if payment be not made, the State auditor at the next session of the legislature must certify to the legislature the amount of the assessments, and provision for the payment of the same with interest shall be made out of the general fund of the State. (Sec. 2, pp. 530, 531.)

The provisions relative to condemnation proceedings have been amplified and combined with consideration of the benefits to be derived from the district works. Judgment is entered for the excess damages over the benefits if any. The damages allowed but not

paid are applied to the satisfaction of the levies against the lands in question. (Sec. 6, p. 538.)

The improvement district law adopted in 1917 has been somewhat reworked. Provision is made for change of the boundaries of the local improvement district and assessment of newly included lands for costs. (Sec. 16, p. 548.)

Consolidation of two or more irrigation districts has been provided for (secs. 6461-1 to 6461-5, pp. 549 to 554), petition to be signed by 50 or a majority of the holders of title to lands susceptible of irrigation within the proposed consolidated district. The petition must be presented to the county commissioners, and the organization proceedings go forward in the same fashion as prescribed for the case of an ordinary irrigation district. The county commissioners, however, call no election if it appear that any board of directors of a district proposed to be included has passed an adverse resolution.

The election for organization will not suffice unless each district to be included shall favor consolidation by a two-thirds vote of the electors casting ballots and unless, furthermore, the land not previously organized, if any be proposed to be included, shall likewise favor the district by a two-thirds vote.

After the directors of a consolidated district qualify they succeed to the duties of the former boards, the districts merged retaining their existence so far as necessary to perform contracts and discharge indebtedness. The directors of the consolidated district may constitute each included district a local improvement district of the larger corporation. Separate funds shall be maintained for each district until the officers of the consolidated district shall discharge all obligations of the former districts. (Sec. 20, amending 6461-3, pp. 551, 552.)

It is further provided that the consolidation shall not impair any obligations of any district included and that the creditors shall be entitled to all remedies as though no consolidation had been effected. All prior obligations shall be a prior lien to that of any obligation undertaken by the consolidated district. (Sec. 21, amending sec. 6461-4, p. 553.)

The property of the districts consolidated, subject to the obligations of the district, become the property of the consolidated district, equitable credit being given therefor to the lands of the included district formerly possessed of such property.

At the hearing upon the petition for organization of an irrigation district the State hydraulic engineer is required to sit with the board of county commissioners in an advisory capacity. (Sec. 1, p. 528.)

Rights of way have been granted to irrigation districts over State lands after due showing to the board of State land commissioners. (Ch. 97, p. 232.)

*Wyoming.*—In the text above (p. 21) the statement was made that Wyoming had made no provision for cooperation between irrigation districts and the United States, and also (p. 161) that in that State it was impossible to compel a minority of landowners to submit to public improvement by irrigation. Both of these points have been remedied by chapter 142, pages 223-242. Wyoming has



now made practically the same provisions for cooperation with the United States which are outlined above on page 21. The powers include drainage.

The former change has been effected by the amendment of sections throughout the law, while the latter is brought about by section 3 (pp. 225-227). The necessity for mailing notice of election for organization to nonresident electors has been injected. The definition of who shall be electors, freeholders, and entrymen is clarified. Those who are citizens or persons who have taken out their first papers are electors. (Sec. 2, pp. 223-225.)

An important amendment has been made in section 833 of the Compiled Statutes (sec 3a, p. 227) by a clause requiring that the organization election must not merely carry by a majority of the legal electors of the district but that such majority shall be the owners in the aggregate of a majority of the whole number of acres within the district. This provision sets up a very difficult standard for the sentiment in favor of organization, particularly if there are areas of unentered land, as is likely under the Smith Act. (See ante, p. 24.) While nonresident owners, as already outlined (p. 161), are entitled to cast their ballots, it is difficult to secure the actual vote of a majority representing the majority of the acreage.

The express powers to lease the use of water together with the right to assign one's use of water for the current year, outlined above (p. 162), have been removed. (Sec. 4, p. 228.)

Where drainage work is taken up with the Federal Government cooperatively, the directors determine the benefits to each tract and the amounts as apportioned remain the basis for fixing annual assessments for drainage purposes except as outlined below. Notice of hearing upon the apportionment is prescribed. If objection be made and overruled the same is deemed appealed to the district court upon the confirmation proceedings. The board must petition for an adjudication of the apportionment of drainage benefits, and the decree thereupon is final unless later showing of manifest injustice be shown upon grounds not ascertainable at the time of the original confirmation proceedings. Decree by way of modification rendered after August 1 of any year is ineffective for such year. Any decree modifying the apportionment must provide such readjustment as may be necessary for a sufficient levy promptly to discharge the liabilities of the district for drainage purposes with security to the creditors equal to that afforded by the original apportionment. (Sec. 7, p. 232, and sec. 21, p. 240.)

Warrants have been made receivable for general fund taxes and interest coupons, and bonds are receivable for bond-fund taxes. In case of delinquency, on the request of the directors the county commissioners are required to accept the above-described substitutes to the extent of the assessment, remitting the interest and penalties. Somewhat similar provision is made in case of tax sale certificates purchased by the county. (Sec. 12, p. 235.)

Provision is made that the Secretary of the Interior, for the purpose of petition for annexation or exclusion of public lands of the United States or for the organization of an irrigation district, shall be deemed to be the owner thereof for the purpose of signing the statutory petitions. (Sec. 17, p. 238.)



## OREGON CONSTITUTIONAL AMENDMENT.

## CONSTITUTIONAL AMENDMENT PROMOTING DISTRICTS.

*Oregon.*—The legislature submitted to the people of this State a constitutional amendment which was carried at a special election June 3, 1919. This permits that the credit of the State may be loaned and "indebtedness incurred to an amount not exceeding 2 per cent of the assessed valuation of all property in the State, for the purpose of providing funds for the payment by the State of interest for a period not exceeding five years on bonds heretofore or hereafter issued by irrigation and drainage districts organized, or to be organized, under the laws of the State of Oregon."

The district must first vote in favor of a State contract at an election. The State is represented by a commission consisting of the attorney general, superintendent of banks, and the State engineer, whose duty it is, as regards irrigation districts, to investigate water supply, soil, need of drainage, market value of property to belong to the district, the irrigable area, including lands of private owners under contract to sell, preferences to honorably discharged soldiers, sailors, marines, members of the Army and Navy corps, and Red Cross nurses.

If the plan is found feasible and contract is made, interest certificates of indebtedness are deposited with the State by the district bearing interest at not exceeding 6 per cent and covering five years' interest on the district bonds. They mature after the five years. The State sells bonds and pays the creditors of the district the interest as due. The State guarantees 5 per cent.

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U.S. SUP. COURT

**Supreme Court of the United States**  
**OCTOBER TERM, 1923**

No. **135**

**NAMPA & MERIDIAN IRRIGATION DISTRICT,**  
*Appellant,*

**vs.**

**J. B. BOND, Project Manager of Boise Project of  
the United States Reclamation Service,**  
*Defendant,*

**PAYETTE-BOISE WATER USERS' ASSOCIA-  
TION, Ltd.**

**Brief of Appellant**

**HUGH E. McELROY, Boise, Idaho,**  
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# Supreme Court of the United States

OCTOBER TERM, 1923

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No. 473

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NAMPA & MERIDIAN IRRIGATION DISTRICT,  
*Appellant,*

vs.

J. B. BOND, Project Manager of Boise Project of  
the United States Reclamation Service,  
*Defendant,*

PAYETTE-BOISE WATER USERS' ASSOCIA-  
TION, Ltd.

---

## **Brief of Appellant**

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### STATEMENT OF CASE

This cause was originally brought in the District Court of the Southern Division of Idaho, and is now on appeal to this court from the decision of the Circuit Court of Appeals for the Ninth Circuit.

Appellant is an Idaho public corporation of the class designated as Irrigation Districts. It has purchased from the United States, water rights delivered from the Boise Project for 40,000 acres of land within its boundaries. This purchase is evidenced by the principal and supplementary contracts at-

tached to the complaint as Exhibits "A" and "B." (Tr. p. 5-17.) It is obligated to pay the United States approximately \$3,000,000 as the cost price of these rights, together with a pro rata share of the annual maintenance and operation charges of Boise Project, to be officially determined by the Secretary of the Interior.

The District also furnishes an older class of water rights appropriated from Boise River for use on 25,000 acres of land. Contract "A" classifies these lands as "project" and "old water right" lands. The remainder of Boise Project, amounting to approximately 100,000 acres of land, lies outside and adjoining the boundaries of the District. These lands which constitute what is left of Boise Project after the elimination of the lands included in the District, are represented by intervenors, Payette-Boise Water Users' Association, Ltd.

This Court is asked to construe that part of the contract marked Exhibit "A" relating to payment of a pro rata share of the annual maintenance and operation charges of Boise Project. It is found in the last sentence in Section 12 of the contract, beginning at the bottom of page 11 of the transcript and is as follows:

"The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project and the same shall be collected by the District for

the United States and paid over by the District to the United States, and upon notice from an officer of the United States in charge of the Boise Project the District will withhold the delivery of water from such Project lands in the District as are in default in the payment of said operation and maintenance charge."

The authority of the Secretary of the Interior to make said contracts is found in Section 5 of the Act approved August 13, 1914 (38 Stat. 686), commonly known as the Reclamation Extension Act, which reads as follows:

"Sec. 5. That in addition to the construction charge, every water right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance of the project or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered; but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water; Provided, that whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized, in his discretion, to transfer to such water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe."

It is our belief that upon the execution of the contract this appellant became the accepted representative of what is termed in this statute as a "separate unit" of Boise Project.

Appellant is a public corporation under the laws of Idaho with jurisdiction to acquire, construct, operate and maintain irrigation works. It has jurisdiction to levy taxes for "construction" and for "operation and maintenance" of such works as declared in such statutes. As is universally true of public utilities, all expenditures are classified under these headings.

In order, however, to fully appreciate the statutory distinction made in said Section 5 between "the construction charge" and "an operation and maintenance charge," it is necessary to consider said section in connection with Section 4 of the same act, which reads as follows:

"Sec. 4. That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid installments of construction charges."



It should be observed, also, that by the terms of contract "A" the construction charge for water rights for approximately 40,000 acres of land was liquidated conditionally at a maximum of \$75.00 per acre and later when the construction charge of the project had been fixed by the Secretary by public notice as provided in said Section 4 of the Federal Statutes, this was reduced to \$70.00 per acre by contract "B."

Hence the cost of the proposed drainage system, which is the subject matter of this litigation, must be governed, as a matter of law, by said Section 4, if it be held that the same is a construction and not an operation charge under this statute and the manner of its collection cannot be a matter of "judgment and discretion" on the part of the Secretary. In other words, the improper collection of the construction charge under the guise and pretense of "operation and maintenance" would deprive appellant of the benefit of the express terms of its contract.

Under the terms of Section 4, the settler is guaranteed that the Secretary shall not impose additional construction without the consent of a majority of the landowners affected. Even then he cannot be charged with construction which does not benefit his land. The Secretary is required to limit the charge to part of the lands if all are not benefited.

Long after this District became the representative of a "unit" of Boise Project, and some time prior to February 15, 1921, the officials of the Reclamation

Service made surveys and investigations of a proposed drainage system to relieve certain waterlogged lands represented by the Water Users' Association, lying entirely outside of the appellant District.

On said date, the Secretary issued a special public notice, purporting to levy an annual charge of a flat rate of \$1.00 per acre per annum for an indefinite period of time on account of said proposed drainage construction.

The material part of said notice is as follows:

"(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.

"(b) A special operation and maintenance charge for drainage purposes of One Dollar (\$1.00) per irrigable acre per year until further notice, to become due and payable Fifty (50c) per irrigable acre on April 1, 1921, and Fifty (50c) per irrigable acre on October 1, 1921, and Fifty (50c) cents per irrigable acre on March 1st and October 1st of each year thereafter until further notice, the money received from such special operation and maintenance charge to be used after the same has been paid in to the United States in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and waterlogging of the lower lying lands of the project by seepage from the irrigation of the higher lands and by seepage from the irrigation

system of the project, to lessen the damage which would otherwise result from the operation of said canal system and to maintain the irrigability of the lands of the project, said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the remainder of said minimum charge per acre and all charges per acre-foot of water used in excess of the amounts of water allowed for such minimum charge to be hereafter announced and determined by Public Notices to be hereafter issued from time to time.

"JOHN BARTON PAYNE,  
"Secretary of the Interior."

This does not purport to be an annual levy "based upon the total cost of operation and maintenance of the Project, or each separate unit thereof for the current year or any particular period of time, nor is it as is required by the statute, made for each acre-foot of water delivered" or upon "a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water" as provided by Section 5 of the Reclamation Statute, but it is an arbitrary demand for the semi-annual payment of a flat sum on certain dates and on the same dates "of each year thereafter until further notice." This charge is patently an attempt on the part of the Secretary to require the landowners to contribute to an indefinite fund for use some time in the future as he might determine. It will be observed that subsection (a) states that while the

record does not show the usual form of announcing the *regular* charge, yet as a matter of fact, that charge is fixed annually as expressly required by the statute on the basis of the water actually used by each landowner. While this *special* charge does not purport to be for a fiscal year but is to continue indefinitely.

Demand was made upon the District for payment of this charge and was refused. The Reclamation Service then threatened to refuse delivery of water under the contract unless payment was made. Whereupon the present action was brought to determine whether the District was liable under its contract for the cost of the proposed drainage. Complainant included in the Bill of Complaint such allegations as were deemed necessary by the Reclamation Service in order to ~~present~~ <sup>specify</sup> the facts as fully as possible. The suit is for ~~special~~ performance by the Government of the contract to deliver water to the District. This form of action was acceptable to the defendant.

It should be observed in Section 10 of the Complaint the plaintiff specifically alleges that the purpose of this charge is the construction of a drainage system which will not benefit the lands within the District and that said drainage system is to be constructed to prevent said lands from being ruined by seepage and alkali "as a result of irrigation from the said irrigation system of the Boise Project."

Since the case was disposed of on the Complaint and Motion to Dismiss the decision must stand or fall upon the facts as alleged in the Bill of Complaint. Appellant contends that the decision actually rendered by the Circuit Court of Appeals is based upon a state of facts not in the record, to-wit: That the Secretary constructed the drainage works "to conserve and protect the property under his charge."

The District Court sustained a motion to dismiss the Bill of Complaint. The case was appealed to the Circuit Court of Appeals, which affirmed the judgment of dismissal, and the District appeals to this Court.

See Nampa & Meridian Irrigation District v. Bond, et al., Book 283F, page 569.

And same case, Book 288F, page 541.

### SPECIFICATIONS OF ERRORS

Appellant relies on the errors assigned on appeal to the Circuit Court of Appeals, which are repeated here and additional errors in decision of that Court, as follows:

First. The Court erred in making the order filed on August 22, 1922, for the dismissal of the Bill of Complaint.

Second. The Court erred in making and entering the decree in said action on the 25th day of October, 1922.

Third. The Court erred in holding as a part of the said order mentioned in the first speci-

cation, that the cost of the proposed drainage works, referred to therein, constituted a part of the annual maintenance or operation charges of the Boise Project under the terms of Sec. 5 of the Act of Congress, approved August 13, 1914 (38 Stat. 686), commonly known as the Reclamation Extension Act, or at all.

Fourth. That the Court erred in holding as a part of said mentioned order, that the cost of the proposed drainage works, referred to therein, did not constitute an increase of the construction charges of Boise Project under the terms of Sec. 4 of the said Act of Congress, commonly known as the Reclamation Extension Act, or at all, and was not governed by the provisions of said section.

Fifth. That the Court erred in holding as part of said mentioned order that the Hon. Secretary of the Interior could announce or determine the amount of said drainage charge, or any part of the operation or maintenance charge of Boise Project, as a flat rate per acre.

Sixth. That the Court erred in holding that Subsection (b) of Exhibit "C" attached to the Bill of Complaint constitutes a sufficient determination or announcement of an annual operation or maintenance charge for the Boise Project under the terms of Section 5 of said Reclamation Extension Act.

Appellant further specifies errors of law found in the opinion and decision of the Circuit Court of Appeals, to-wit:



Seventh. In failing to require the defendant to file its answer and establish its claim by competent testimony pursuant to the following statement in the opinion:

“While indefinite, the term operating expense is a broad and comprehensive one, and its meaning in a given case depends on the nature and amount of the expenditure, and all the surrounding circumstances. As said by the Court in (f. 130) *Schmidt v. Louisville C. & L. Ry. Co.*, 84 S. W. 314, 318: ‘There is no rule of law declaring what constitutes operation expenses. That is to be determined by the testimony as to each item of expenditure. It is a matter of evidence, and determinable like any other fact.’” (Page 57, Transcript.)

Eighth. In reciting in said opinion, the following statement of facts not found in the record, to-wit:

“The situation confronting the Reclamation Service was this: The necessity for drainage follows irrigation on an extensive scale almost as a matter of course. It cannot be determined in advance with any degree of certainty when drainage will be required, or its cost or extent when required. If not provided for in advance, as was the case here, it can only be provided for by agreement with a majority of the landowners affected, or by a maintenance and operation charge.” (Page 57 of Transcript.)

In holding that the drainage charge under consideration was incurred by the Secretary “to conserve

and protect the property under his charge" as stated in said opinion.

Ninth. In holding as a matter of law:

"It has been almost universally held that damages to person or property resulting from operation is a proper operating expense, and had injury resulted to crops or other property from the operation of this system, compensation for such injury would fall within the most restricted meaning of that term." (Transcript, Page 58.)

Tenth. In holding that the determination of the Secretary of the Interior to the effect that the construction of a new drainage system is a proper operation charge is controlling upon the Courts, and refusing to determine whether said determination is in accord with law and the contract under consideration.

## ARGUMENT

### I.

#### JUDGMENT AND DISCRETION OF SECRETARY OF THE INTERIOR IN ADMINISTERING RECLAMATION ACT.

The decision of the Circuit Court of Appeals now under consideration concludes as follows:

"In other words, the expense of preventing injury by seepage resulting from operation, is a proper operation charge, or, at least, *the determination of the Secretary of the Interior to that effect is controlling upon the courts.*

The jurisdiction of the Secretary in relation to the public lands is distinctly different from the ordinary jurisdiction of the heads of executive departments of the government and is even different from the jurisdiction he may exercise as a mere executive in charge of reclamation projects. His jurisdiction relative to public lands has been stated as follows:

In *U. S. ex rel Riverside Oil Company v. Hitchcock*, 190 U. S. 324, the Court said:

"Congress has constituted the land department, under the supervision and control of the Secretary of the Interior *a special tribunal with judicial functions* to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. \* \* \* Neither an injunction or mandamus will lie against an officer of the land department to control him in discharging an official duty which requires the exercise of his judgment and discretion." (Italics are ours.)

But even in dealing with the public lands, the Secretary is not above the law. In case of *United States v. George*, 288 U. S. 14, the Court said:

"Acting under the authority presumed to be given by Sec. 2246 and other sections, a regulation was promulgated which prescribed forms of taking pre-emption and final homestead proof by questions and answers, and provided that 'the claimant will be required to testify as a witness, in his own behalf, in the same manner.' It was testimony exacted in pursuance of this regula-

tion and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; Sec. 2291 requires two only, and, as we have said, points out what proof, in addition, the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by Sec. 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Sec. 2291 requires, why not other conditions and the disposition of the public lands thus be taken from the legislative branch of the government and given to the adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all, it is as broad as its subject, and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.

"In *United States v. United Verde Copper Co.*, supra, this Court considered the power of the Secretary of the Interior under an Act of Congress giving the right to cut timber from the public lands for certain purposes which

were enumerated, 'or domestic purposes,' and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe 'for the protection of the timber and of the undergrowth growing on such lands, and *for other purposes.*' (Italics are ours.) The Secretary made a regulation which provided, among other things, that no timber should be 'permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.' The justification urged for the regulation was that the word 'domestic' meant household. This court rejected the contention, and decided that the regulation transcended the power of the Secretary. We said: 'If rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'

"In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental."

This Court has repeatedly reviewed the official action of the Postmaster General when classifying periodicals under the postal laws and has held that

the decision of the Postmaster General will be treated as conclusive "unless palpable error appears." In case of *Central Trust Company v. Central Trust Company of Illinois*, 216 U. S. 261, the Court said:

"We have had occasion to consider the effect of findings of fact by officers in charge of the several departments of the Government and the accepted rule is that these findings are conclusive *unless palpable error appears.*"

In *Leach v. Carlile*, 258 U. S. 138, this Court said:

"The conclusion of the Postmaster General, under which a fraud order was issued, pursuant to U. S. Rev. Stat., Secs. 3929, 4041, that the substance which the person against whom the order was issued was so far from being the panacea of which he was advertising it through the mail to be that, by so advertising it he was perpetrating a fraud on the public will not be reviewed by the Courts where it is fairly arrived, and has substantial evidence to support it, *so that it cannot be justly said to be palpably wrong and therefore arbitrary.* (Italics are ours.)

In *Smith v. Hitchcock*, 226 U. S. 58, in dealing with a similar determination, the Court said:

"Thus a question of law is raised, although as suggested in *Bates & G. Co. v. Payne*, we should not interfere with the decision of the Postmaster General unless *clearly of the opinion it was wrong.*" (Italics are ours.)



But the jurisdiction of the Secretary in using public funds for construction "before the cost of the project has been fixed by public notice," is a very different matter from his jurisdiction after the cost has been fixed. Section 4 of the Reclamation Extension Act positively forbids any increase in the construction charge without consent of a majority of such landowners. The construction of the proposed drainage works is a major act of construction which increases the cost of water rights whether designated by the Secretary as a *construction* or as *operation* expense. Unless the Secretary can impose a construction expense running into millions of dollars by simply "determining" that it is an operation charge, then the express provisions of law found in said Section 4 must be respected.

The material part of said Section 4 reads as follows:

"Sec. 4. That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid installments of construction charges."

When the Secretary executed the contract "A" he was not contracting with reference to public lands of the United States. These lands were all privately owned. Because he had no jurisdiction over these lands, he made this contract in order that appellant as a public corporation, might require unwilling landowners to accept water from the project. The official statement on the subject, appearing at pages 48 and 49 of the Record, is in part as follows:

"Notes — The term 'project land' as used herein refers to lands under the constructed unit of the project and having no water right from private canals, as distinguished from old water right lands having a partial water supply from private canals." (p. 48.)

"Explanatory Statement:

"Unless irrigation districts or some form of organization capable of binding all the lands should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual landowners. Without district organizations binding all lands, it is estimated that a considerable percentage of the landowners will avoid paying the government for a water right by picking up waste water, or securing water in some other way or holding the land for speculation without irrigation. Consequently it is estimated that a charge of approximately \$70 per acre will be necessary if districts are organized and contracts made, binding all irrigable project lands to pay for a water right, and a charge

of \$80 per acre without such organization. That is, it is estimated that a payment of \$70 per acre from all project lands guaranteed by an irrigation district having the taxing (fol. 112) power enabling it to assess all the lands would bring in a total revenue or payment equal to the amount which would be collected by a charge of \$80 per acre upon such of the project lands as the owners thereof may elect to purchase water rights for." (p. 49.)

It should be observed that the supplementary contract marked "B" (pages 13 to 17, Tr.) liquidates the construction charge for lands within this District at \$70 per acre in accordance with the official statement from which we quote.

Under the irrigation district law of Idaho these contracts were authorized by a two-thirds vote of the electors of the District, and it may be presumed that they relied upon the positive declaration of the Secretary fixing the construction charge at the stated price per acre when they voted the authority. The situation then is as follows:

Contract "A" makes the lands in this District a "unit" of the Boise Project as that term is used in Section 5 of the Reclamation Extension Act. Before the cost of the Project was fixed by public notice, the Secretary, acting within his jurisdiction, determined that certain irrigation canals and reservoirs and certain drainage systems should constitute the Boise Project. He determined that these were necessary

and located them at such points as his judgment and discretion dictated. Every dollar so expended for drainage works of precisely the same character as that now under consideration was included as part of the construction charge of Boise Project. The drainage systems so constructed are set out in detail on page 47 of the Record and total the sum of \$776,-754.44, of which \$235,228.99 were charged to the Project lands and were included as a part of the construction costs announced by the Secretary.

In the very contract under consideration, provision is made for a drainage system of the precise character and use as that which the Secretary proposes to construct and charge as an *operation charge* of the Project, and the expense is classed in the above mentioned publications as a construction charge.

But said drainage system was planned as a part of a general plan for the whole Project. Contract "A" contains the recital:

"NOW THEREFORE, It is hereby agreed:

"1. That as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars (\$557,000.00)." (See bottom of page 6, Tr.)

"It is fully understood that the United States is to expend only Five Hundred Fifty-seven Thousand Dollars (\$557,000.00), including cost of preliminary work in drainage construction for the District, under this contract, and to stop

when such limit of expenditure has been reached. It is not expected that the lands of the District can be completely drained at this cost nor a drainage system extended to each farm unit, but that only a number of principal drains will be constructed with which individual and community farm drains can be connected." (Page 7, Tr.)

Hence, the said drainage system, being constructed before the cost of water rights was fixed by public notice and also being part of a general plan, was equitably and properly charged as part of the construction cost of the whole project.

The drainage system now under consideration is neither for the whole Project nor can it be included in the construction charge, since that has already been fixed. Section 4 flatly requires that the consent of a majority of the landowners to be affected shall be secured or else the construction charge shall not be increased. If, in fact, the cost of a drainage system is a construction charge and not an operation and maintenance charge, then the designation of such a charge as an "operation charge" coupled with a threat that if the appellant does not pay the same, the Secretary will refuse to deliver the water rights which have been purchased at the rate of \$70 per acre in full payment therefor, is a clear threat with actual power to carry it out, that he will destroy the vested rights of landowners in 40,000 acres of land unless they submit to an illegal demand from which no possible benefit can accrue to them.

We therefore insist that this is not a case involving the exercise of judgment and discretion by the Secretary, but that it involves the refusal on his part either to respect the plain provisions of Sections 4 and 5 of said statute and the plain provision of our contract as set forth in the Statement of the Case.

## II.

### IS THE COST OF THE PROPOSED DRAINAGE CONSTRUCTION A CONSTRUCTION CHARGE?

Section 5 of the Reclamation Extension Act reads:

Sec. 5. *That in addition to the construction charge*, every water right applicant, entryman or land owner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project, *or each separate unit thereof*, and such charge shall be made for each acre foot of water delivered." (Italics are ours.)

It is clear that the operation and maintenance charge here provided is *in addition to the construction charge*. Hence it is clear that project expenses can be legally classified in two classes, neither of which includes the other. These terms are found both in the reclamation act and in the contract. Furthermore, this classification is universally used in all statutes relating to Public Utilities Commissions,



whether Federal or State, and in the volumes of reports issued by such commissions. Also in all laws relating to drainage or irrigation districts. They are in universal use, and always with the same general significance.

Under "Maintenance" the Standard Dictionary gives:

"Maintenance of way (Railroad) the keeping in repair of tracks, bridges, etc."

In "Words and Phrases," under head of "maintain" we find:

"The word 'maintain' has been defined as meaning to support that which has already been brought into existence. *Kendrick and Robers vs. Warren Bros. Company*, 72 Atl. 461, 464;"

" 'Maintain' is defined to mean, to hold or to keep in a particular state or condition, especially in a state of efficiency; to support, sustain, not to suffer to decline.' *Kovachoff vs. St. Johns Lumber Company (Ore.)* 121 Pac. 801, 803."

"The word 'maintain' is practically the same then as 'repair,' which means to restore to a sound or good state, after decay, injury, dilapidation or practical destruction, and when used in reference to railroad right of way, includes the idea of keeping the right of way in such a condition that it can be used for the purpose for which it was intended." *Missouri K. & T. Company of Texas vs. Bryan*, 107 S. W. 572, 576, (citing *Verdin vs. City of St. Louis (Mo.)* 27 S. W. 477.)

Under head of "Construction" in the same work, we find:

"The term 'construction' with reference to a building, means the putting together of the material used therein. *Scharff vs. Southern Illinois Const. Co.*, 92 S. W. 126, 130, 115 Mo. App. 157."

"Although the term 'establishment' of a drainage ditch means the action of the Board of Supervisors in ordering it, and 'construction' means the actual work, these terms are so interchangeable that, in the absence of evidence showing greater damage at one point than another, they may be used as synonymous in instructions in a proceeding to assess damages for the taking of land for a drainage ditch. *Larson vs. Webster County*, 130 N. W. 165, 167, 150 Iowa, 344."

Acting within the sound discretion vested in him by law, the Secretary of the Interior determined the necessity for irrigation and drainage canals and other structures necessary for Boise Project and constructed these with the funds appropriated by the Government, before fixing the construction charges by public notice. A list of the structures constituting the project and their cost, is found on pages 142 and 143 of the Twentieth Annual Report of the Reclamation Service for fiscal year 1920-1921, issued officially by the Secretary.

The construction charges include a general drain-

age system for the project as a whole as per the recital we have made from our contract "A." Said drainage system is specified as a construction charge and is described as follows:

"Drainage system:

Pioneer District.....	297,231.38
Nampa-Meridian District.....	1,750.98 303,357.26
Fargo Basin.....	37,771.48
From Deer Flat.....	31,796.98
Riverside District.....	58,236.50 249,596.53

Miscellaneous:

Gibbons Drain.....	1,036.31
West End Drain.....	2,342.54
General Investigations and surveys.	4,242.12

Total drainage system.....	58,987.48	927,374.60"
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Every dollar of said expense was classified as a *construction charge of Boise Project*. The same was true of all drainage work until the instance now before the court. The drainage works of this project are also listed on page 47 of the Transcript.

In order to secure legal sanction for building drainage works as construction charges before the cost was fixed by notice, the suit of the United States vs. Ide was brought and finally determined in the Circuit Court of Appeals for the Eighth Circuit, reported in 277 Fed. 382, where the court said:

"(7, 8.) It is well settled that plaintiff may construct drainage works *as a part of its irrigation system*. Bissett vs. Pioneer Irr. Dist., 21 Idaho 98, 120 Pac. 461; Pioneer Irr. Dist. vs. Stone, 23 Idaho 344, 138 Pac. 382; Nampa &

Meridian Dist. vs. Petrie, 28 Idaho 227, 153 Pac. 425; G. G. Burt, et al., Drainage Dist. vs. Farmers Co-Operative Co., 30 Idaho 752, 168 Pac. 1078. *The necessity for drainage, and the method of conducting the work* are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the Courts." (Italics are ours.)

This decision is significant on several points:

1. The drainage was constructed as a part of the irrigation system and not as operation charge therefor.

2. The Secretary determined the *necessity* for drainage and *methods of conducting the work* before public notice to be paid for with public moneys and included as construction cost in public notice.

3. The decision as to jurisdiction rests solely on Idaho cases ~~and~~ in every one of them the Idaho Supreme Court confirmed the drainage work as a *construction charge*. One of these cases construed the identical contract now before this Court.

It should be observed that the Secretary of the Interior is required by the Federal Statutes to proceed in conformity with State laws in carrying out the provisions of the Reclamation Act.

Section 8 of the Reclamation Act of June 17, 1902, reads as follows:

"Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any

State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

The provisions of the contract under consideration were exhaustively considered by the Idaho Supreme Court in two confirmation proceedings. ~~The first of these, being the one cited in the~~ *Peterson* ~~Idaho~~ case, 153 Pac. 425, related to the validity of the contract between the District and the Government. In that case the Court held that the cost of the water rights and of the drainage works must be assessed to the lands on the basis of benefits resulting therefrom under the statutes relating to construction charges. The contract was again before the Court on the confirmation of the assessment of benefits for the drainage charges and the Court cancelled the assessments for drainage charges when levied as operation and maintenance charges and required that they should be assessed as construction charges on basis of actual

benefits resulting from drainage. Considered in connection with the case before the Court this decision is directly in point upon two crucial principles to-wit:

1. Under the Idaho law an irrigation district will not be permitted to collect for drainage construction as an operation or maintenance charge. It must be collected as a construction charge.

2. Under the Idaho law an irrigation district will not be permitted to collect the cost of drainage construction except on the basis of the actual benefits resulting to the land from drainage. In other words, this appellant can neither collect the drainage costs under consideration as an operation and maintenance charge nor can it be collected on the basis of drainage benefits since under the allegations of the complaint the lands in the District are not benefited at all by this particular drainage.

The decision is reported in 37 Idaho, page 45, 223 Pac. 531. On page 533 of the Pac. Rep. the Court said:

"In Pioneer Dist. v. Stone, and Nampa & Meridian Dist. v. Petrie, this Court simply held that an irrigation district has the power to contract for the construction of a drainage system under the irrigation district law. There is nothing in the opinions to indicate that the district can charge the cost as an operating expense and make a flat assessment. On the contrary, in Nampa & Meridian Irr. Dist. v. Petrie, the



Court said: '(5) Where a contract is entered into between an irrigation district and the United States providing among other things, that arid lands within the jurisdiction of the irrigation district, in order to secure a full water right from a government project, shall be assessed not to exceed \$75 per acre, such contract is subject to the laws of this state governing irrigation districts and to the apportionment of benefits thereunder, and the fixed charge to be assessed against the lands of any particular land owner within such irrigation district for such water right will be finally determined by the district court of the judicial district within which said irrigation district is located, as provided by sections 2400-2403, Rev. Codes.

" '(6) The same rule and the same procedure, as indicated in paragraph 5, is to be followed in the assessment of benefits with reference to the sale of partial water rights to supplement water rights already existing, and also with reference to the assessment of benefits incident to the construction of a drainage system within an irrigation district.' "

"The opinion makes it perfectly clear that the contract is subject to the laws governing irrigation districts in the assessment

"of benefits. 28 Idaho 237, 153 Pac. 428. The section of the statute governing the apportionment of benefits and assessment is C. S., Sec. 4362, which provides that the assessment must be made in accordance with the benefits which

will accrue to each of the tracts or subdivisions from the construction of the works."

On rehearing the Court said:

"On the original hearing respondent justified the flat assessment for drainage purposes on the theory that the expense of drainage was *part of the maintenance or operating cost*. This theory we could *not approve*. On rehearing respondent took the position that the assessments for drainage were based upon the benefits *accruing to the lands from irrigation*. In other words, if a tract of land derives a certain benefit from the water furnished by the district for its irrigation, it derives the same benefit from the drainage project built by the district for the drainage of the wet lands. It is apparent, as we said in the original opinion, that the assessments are not based on the *benefits derived from drainage*. With this new theory of respondent we are not in accord. *When the statute provides that land within an improvement district may be assessed for the cost of the improvement in accordance with benefits derived it means, benefits derived from the improvement. Where the assessment is for the drainage project, it must be based on benefits derived from it, and not on benefits derived from irrigation.*" (Italics are ours.)

It will be observed that under the foregoing decision appellant is powerless to collect the charge imposed by the Secretary. Also, although the Boise Project is a Government Project Sec. 8 of the Rec-

lamation Law requires that: "The Secretary of the Interior, in carrying out the provisions of this Act shall proceed in conformity with" state laws.

We claim therefore, that the decision of the Idaho Supreme Court in the Petrie case should be regarded as authority sufficient to justify this court in holding that the Secretary was in error in determining that drainage construction could be imposed in any way except as a construction charge and governed by Section 4. Also that he was in error when he attempted to impose said charge on a unit of the Project which is not benefited by the proposed works.

But if the court cannot so hold then we urge that said decision together with the classifications heretofore made by the Secretary under which drainage construction was determined to be a construction charge together with the fact that the proposed construction involves an expenditure of large sums of money and the proposed classification is absolutely without precedent indicate that the action of the Secretary is probably arbitrary and that appellant is entitled to the benefit of that part of the decision under consideration which reads as follows:

"While indefinite, the term operating expense is a broad and comprehensive one and its meaning in a given case depends on the nature and amount of the expenditures, and all the surrounding circumstances. As said by the court in (fol. 130) *Schmidt v. Louisville C. & L. Ry.* C. 84 S. W. 314, 318: 'There is no rule of law declaring what constitutes operation expenses.

That is to be determined by the testimony as to each item of expenditure. It is a matter of evidence, and determinable like any other fact.'"  
(p. 57, Tr.)

Under said statement, we assert that we are entitled to have the case remanded and defendant required to answer and establish his claim upon competent testimony.

### III.

#### POWER OF THE SECRETARY TO CONSERVE AND PROTECT THE PROPERTY UNDER HIS CHARGE

We quote from the opinion:

"The situation confronting the Reclamation Service was this: The necessity for drainage follows irrigation on an extensive scale almost as a matter of course. It cannot be determined in advance with any degree of certainty when drainage will be required, or its cost or extent when required. If not provided for in advance, as was the case here, it can only be provided for by agreement with a majority of the landowners affected, or by a maintenance and operation charge. The prosecution of the present suit gives little promise that the necessary consent could be obtained, but the *power* of the *Secretary to conserve and protect* the property under his charge is not dependent upon any such consent."

The facts assumed are contrary to the record. The proposed charge is for the construction of a drainage

system to relieve lands of seepage water. It is not to conserve and protect the property of the Government. Not a single structure, dam, ditch or reservoir placed by the Government on this project will be conserved and protected by this expense. The notice marked Exhibit "C," page 17 of Record, expressly admits that it is to be used "in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and waterlogging of the lower lying lands of the Project by seepage from the irrigation of the higher lands," etc. This much and no more is admitted by the Bill of Complaint. We think the Court can take judicial notice that the irrigation works and structures all necessarily lie higher than the lands irrigated therefrom and that the seeped lands lie lowest of all and a long distance usually from the property of the Government under the charge of the Secretary. It is the *reclamation* of lands lying under the Government works that is to be accomplished and nothing else. The status of the works by which the drainage is accomplished has long been established but never before has it been suggested that the work is justified to save and protect government property.

Arid lands are reclaimed by irrigation. Seeped lands are reclaimed by drainage. But both are included in the general term "Reclamation."

In case of *U. S. vs. Ide*, the sole question was the jurisdiction to construct drainage works of this

character. No one suggested or claimed that the jurisdiction was based on the inherent right and duty of the Secretary to conserve and protect government property. The court said it might be built as part of the irrigation system. That decision rested solely on Idaho cases in which drainage was treated as a major act of construction. The cited case of G. G. Burt et al Drainage District vs. Farmers Co-operative Co., 30 Idaho, 752, 168 Pac. 1078, held:

"This court has held that an irrigation district may construct drainage works as a necessary *complement* of its irrigation system."

The "complement" is that which *completes*. It is not that which maintains, conserves or preserves. The need for drainage is caused by irrigation. Any irrigation system which makes no provision for drainage is incomplete until such works are constructed as may become necessary. The Secretary has judgment and discretion in fixing the amount and determining the necessity as long as he is using public funds which will be returned in the construction charge. Later, he is governed by Sec. 4 of the Reclamation Extension Act. But the works provided *before* and *after* public notice are of precisely the same status. They cannot be denominated "drainage" before and "conservation and protection" afterwards.



The Supreme Court of California dealt with this matter in following cases:

In case of Laguna Drainage District vs. Charles Martin Co., (California) 77 Pac. 935, the Court was discussing the constitutionality of a drainage district law. The Court said:

"Both acts, too, provide for the reclamation (because the term 'drainage of land' has practically the same application as 'reclamation'; the one is the means employed, the other result) of bodies of land susceptible of one mode of reclamation."

And in case of Madera Irrigation District case, 92 Cal. 323, 28 Pac. 278, the Court said:

"Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such legislation must be upheld upon the same principle, namely, the welfare of the public, and particularly that portion of the public within the district affected by the means adapted for such reclamation."

But the Court implies that if the Secretary is required to secure the consent of a majority of the landowners something terrible may result. This conclusion or implication is contrary to the admitted facts as to reason.

In Section 14 of our Complaint (p. 4, Tr.) we allege:

"That immediately upon the entry of said decree, the water users from Boise Project represented by the said Payette-Boise Water Users' Association, being the landowners of the Project outside of Complainant District, individually entered into the certain contract provided for in said decree and appearing therein as Exhibit 'A' of said stipulation, and thereby contracted and agreed that the Secretary of the Interior might build the said drainage works referred to in Par. 10 hereof and that the landowner would pay the charges (fol. 15) therefor provided in said contract."

It is therefore admitted that the members of the Water Users' Association representing 100,000 acres of the Project, being the part in which the drainage is to be constructed, have expressly contracted to pay this charge.

But suppose they had refused. All that they have is invested in this land. Surely they are presumed to have sense enough to consent to drainage if it is needed and the plan is satisfactory and the cost is not destructive. It is their land that is being destroyed. It is their money which will be spent. Otherwise, a visionary or impractical engineer, without a dollar at stake in the project, might impose the charge under mistake of judgment and ruin the community. If the law is defective, the mistake has been made by Congress and can only be corrected by it.

## IV.

## CAN THE CHARGE BE JUSTIFIED AS OPERATION CHARGE TO PREVENT INJURY FOR WHICH DAMAGES MAY BE RECOVERED?

In the decision under consideration the Court held:

"It has been almost universally held that damages to person or property resulting from operation is a proper operating expense, and had injury resulted to crops or other property from the operation of this system, compensation for such injury would fall within the most restricted meaning of that term. Furthermore, the power of the Secretary does not stop at reparation for past injuries. It extends to the prevention of future injuries as well, and if, in the exercise of the broad discretion vested in him, the Secretary deems it advisable to incur expense to prevent future losses rather than make reparation after the losses have been incurred, a court of equity will (fol. 131) not review his discretion." (P. 58, Tr.)

It will be conceded that public utilities are liable for damages to person or property resulting from the negligence of the management and that the amounts paid out for such damages may be charged as operating expenses. But no court has ever held in favor of such liability where the damage is caused by seepage from the operation of irrigation canals or the irrigation of lands unless there was negligence in the construction or operation of the ditch or use

of the water. It is not pretended that the seepage under consideration results from such cause. In the arid regions the owners of the higher lying lands as well as those whose lands are subject to seepage resulting from irrigation, have a constitutional right to divert water by means of canals constructed according to the engineering practices of the community as well as to irrigate lands therefrom in the manner commonly practiced and without negligence. The seepage which unavoidably results from carrying water from ditches made of earth and gravel and from the deep percolation of water in the sub-soil resulting from irrigation is classed as *damnum absque injuria*. Any other theory of the law would almost nullify efforts to reclaim land by irrigation. In case of Nampa & Meridian Irrigation District v. Petrie, 37 Idaho 45, 223 Pac. 531, the Idaho Supreme Court, in criticizing a contention of this character, said:

"If it means that an irrigation district is absolutely liable for injury caused by seepage water in the absence of negligence on its part, it is squarely in conflict with the rule long established in this and the other arid and semi-arid states, that one who conducts irrigation water through a ditch, or uses it on his land, is not liable for injury caused by seepage unless he is negligent in the construction or operation of the ditch, or the use of the water. *McCarty v. Boise City Canal Co.*, 2 Idaho (Hasb) 245, 10 Pac. 623; *Arave v. Idaho Canal Co.*, 5 Idaho 68,

46 Pac. 1024; *Stuart v. Noble Ditch Co.*, 9 Idaho 765, 76 Pac. 255; *Verheyen v. Dewey*, 27 Idaho 1, 146 Pac. 1116; *Burt v. Farmers' Co-Operative Irr. Co.*, 30 Idaho 752, 168 Pac. 1078. There is no proof and no contention that the district was negligent."

In case of *Campbell v. B. R. & A. W. & M. Company*, 35 Cal. 683, the Court said:

"The defendant was bound to the use of such care in the management of the ditch as prudent persons employ in the conduct of their own affairs." (Citing cases.)

In *Fleming v. Lockwood*, (Mont.) 92 Pac. 962, the syllabus reads:

"The owner of an irrigation ditch, seepage of water from which, not intentionally caused, injures the property of another, is liable for the injury only in case of negligence." (Citing cases.)

We challenge counsel for respondent to cite a single decision of any court in support of the decision of the Circuit Court of Appeals on this point.

## V.

We charge that the public notice attempts to fix a flat rate per acre in violation of said Section 5, which requires that the operation and maintenance charge shall be—

"based upon the total cost of operation and maintenance of the project, or each separate

unit thereof, and such charge shall be for each acre-foot of water delivered."

The public notice states—

"Announcement is hereby made that the annual operation and maintenance charge for the irrigation season 1921 and until further notice against all lands of the Boise Project under public notice (except 1800 acres in State of Oregon) shall be divided into two parts:

"(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.

"(b) A special operation and maintenance charge for drainage purposes of One Dollar per irrigable acre per year until further notice \* \* \* said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the remainder of said minimum charge per acre and all charges per acre-foot of water used in excess of the amounts of water allowed for such minimum charge to *be hereafter announced and determined by public notices to be hereafter issued from time to time.*" (Tr. pp. 17-18.)

This is a continuing notice of a drainage charge of \$1.00 per year per acre without regard to the amount of water used, or the total cost of the operation for the current year. The terms of the law positively preclude the possibility of a lawful maintenance and operation charge, except for yearly



periods and upon the basis of a pro rating of the charge to the landowner on the basis of the amount of water he has actually used.

This charge can only be announced at the close of the irrigation season, upon an actual determination of the total cost for the year and the amount of water used during the irrigation season, by each landowner. *The law guarantees to the economical user of water a decreased charge as an incentive to economy in use. This notice strikes down that guaranty.*

The latter part of the announcement is not authorized by law and is meaningless. The announcement of the drainage charge merely constitutes an arbitrary demand for money. If the Secretary can demand \$1.00 per acre in this way, he can demand \$10 just as well. If we cannot contest this charge this year we cannot do so next year, or another year. The charge can be repeated just as often as the Secretary desires. The charge is dated in February, 1921. This action was not brought until April, 1922. If said notice could have been supplemented so as to make it legal, if that is possible, long prior to this suit an additional announcement could have been made and the defendant could have justified the charge by proper answer. This he has not done. As was stated in the case of the United States v. George, *supra*:

"This Court rejected the contention and decided that the regulation transcended the power of the Secretary. We said: 'If Rule 7 (the regu-

lation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'

"In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental."

We respectfully submit that the case at bar directly involves a distinction between the legislative and administrative function and we are entitled to have this distinction recognized and enforced. We insist that the Secretary must obey the positive requirements of the statute and base the charge upon the amount of water actually used and the total cost of the project for the current year. The record further shows that while the Secretary is seeking to enforce this charge of \$1.00 per acre against appellant as only a part of the drainage charge for the year 1921, yet only about four months later, and on July 12, 1921, the Secretary entered into a binding agreement with the Water Users' Association for a flat rate of \$1.00 per acre *in full payment* of the drainage charge for 1921. This applied to all of the

lands of the project outside this District, aggregating 100,000 acres. (Tr. Sec. 10, p. 22.)

Said contract provides a lower charge for the lands outside than those in this district. In other words, the record shows that the Secretary is attempting to enforce a discriminating charge against appellant, which is neither based on the amount of water used as required by Section 5, nor is it the amount charged to the rest of the lands of the project or any of them, nor is it based on the total cost of the Project.

## VI.

### THE DISTRICT AS A UNIT OF THE PROJECT

Section 5 of the Reclamation Extension Act provides that the landowner shall pay—

“an operation and maintenance charge based upon the total cost of operation and maintenance of the project, *or each separate unit thereof*,” etc.

What is the legal significance of the words, “or each separate unit thereof”?

Said Section 5 also provides:

“That whenever any legally organized water users’ association or irrigation district shall so request, the Secretary of the Interior is hereby authorized in his discretion, to transfer to such water users’ association or irrigation district, the care, operation and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe.”

The Secretary contracted with this appellant under said statute. It is a public corporation with jurisdiction to drain the project lands within its boundaries. The record discloses the reasons for the contract. Among other things, the Director of the Reclamation Service said on page 49 of the transcript:

"Explanatory Statement:

"Unless irrigation districts or some form of organization capable of binding all the lands should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual landowners. Without district organizations binding all lands, it is estimated that a considerable percentage of the landowners will avoid paying the Government for a water right by picking up waste water, or securing water in some way or holding the land for speculation without irrigation."

Having created this unit, must it not affirmatively appear from evidence or admissions that the proposed drainage will benefit the lands of this unit before they can be charged with that expense? Sections 4 and 5 of the Statute both recognize this principle. Section 4 provides that the increased cost must be charged to the lands affected, and Section 5 provides that the cost must be determined according to the unit.

Appellant has alleged that the drainage under consideration is entirely outside the District and pay-

ment has been refused on the grounds that the drainage will not benefit the lands of the District.

For the foregoing reasons, Appellant prays the decision be reversed.

Respectfully submitted,

HUGH E. McELROY,

FREMONT WOOD,

*Solicitors for Appellant,*

Boise, Idaho.

16

IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1921

No. 125

NARITA & MERIDIAN IRRIGATION DISTRICT, Appellant.

JOHN C. COOPER, Attorney General of the United States, Commissioner of the General Land Office, and WILLIAM E. MOSE, of the United States Department of the Interior, Appellees.

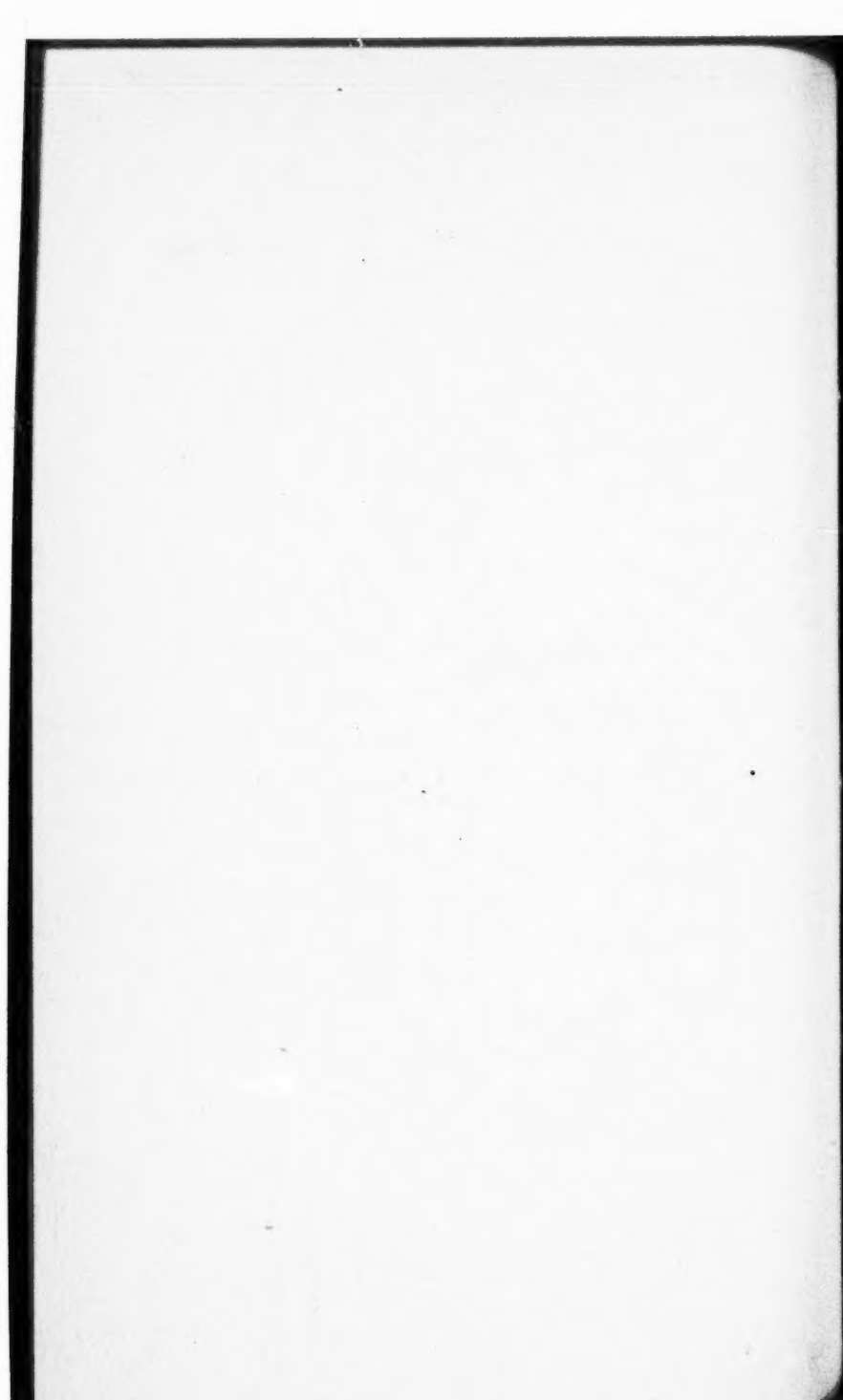
Argued at the October Term, 1921, on the 10th day of November.

WILLIAM H. HARRIS, OF APPELLANT

JOHN C. COOPER,

WILLIAM E. MOSE,





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# In the Supreme Court of the United States

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OCTOBER TERM, 1924

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No. 135

---

NAMPA & MERIDIAN IRRIGATION DISTRICT, *Appellant*,

vs.

J. B. BOND, Project Manager of Boise Project  
of the United States Reclamation Service,  
and PAYETTE-BOISE WATER USERS  
ASSOCIATION, Ltd., *Appellees*.

---

*Appeal from the United States Circuit Court of  
Appeals for the Ninth Circuit*

---

REPLY BRIEF OF APPELLANT

---

HUGH E. McELROY,  
Boise, Idaho,  
FREMONT WOOD,  
Boise, Idaho,  
*Attorneys for Appellant.*

THE HISTORY OF THE

REIGN OF

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# In the Supreme Court of the United States

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ASSOCIATION, Ltd., *Appellees*.

---

*Appeal from the United States Circuit Court of  
Appeals for the Ninth Circuit*

---

## REPLY BRIEF OF APPELLANT

---

### STATEMENT OF FACTS

1. This controversy is between Appellant and Appellee, Bond, representing the United States. The Water Users' Association was permitted formally to intervene. The Court made its decision upon the motion of Appellee, Bond, to dismiss the complaint.



The decision of the Court was based on the argument under that motion. The Water Users' Association has filed a brief on this appeal. The reference in brief filed by Water Users' Association to contract under consideration and the 1921 contract between the Secretary and the Association in relation to drainage to which this appellant was not a party, tends to confuse the facts in the case. Said last mentioned contract did not mention this Appellant and did not purport in any manner to bind it. The form of procedure in this action was agreed upon between the attorneys for appellant and for the Reclamation Service as a suitable method of presenting this controversy to the Court.

2. We call attention to certain statements of fact in the brief of Appellee, Bond, on page 2, where counsel say:

"In the beginning, as stated by the District Court, all the Project lands, whether within or without the District, had precisely the same status (R. 33). They were all bound by subscriptions to the stock of the Payette-Boise Water Users' Association, and thereby subjected to a lien for the charges to be imposed by the Secretary of the Interior."

The 40,000 acres of so-called District Project lands were privately owned and subject to the district as a public corporation, before the project was organized. Only part of the landowners were willing to

apply for project water. The lands were later called "Project Lands" because they were situated so that it was feasible to water them from Boise Project when constructed. The Reclamation Service defined the term "Project Lands" as follows (R. 48):

"Notes: The term 'project lands' as used herein refers to lands under the constructed unit of the project and having no water rights from private canals." (R. 48.)

The Government transferred rights in the Project sufficient for 40,000 acres, to the Irrigation District, accepting the obligation of the District for repayment of every dollar they had cost, for the reason that dealing with the individual stockholder in the Water Users' Association, had proved unsatisfactory. We quote from the official statement (R. 49):

*"Explanatory Statement.* Unless irrigation districts or some form of organization capable of binding all the lands should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual landowners. Without district organizations binding all lands, it is estimated that a considerable percentage of the landowners will avoid paying the government for a water right by picking up waste water, or securing water in some other way or holding the land for speculation without irrigation. Consequently, it is estimated that a charge of approximately \$70 per acre will be necessary

if districts are organized and contracts made, binding all irrigable project lands to pay for a water right, and a charge of \$80 per acre without such organization. That is, it is estimated that a payment of \$70 per acre from all project lands guaranteed by an irrigation district having the taxing (fol. 112) power enabling it to assess all the lands would bring in a total revenue or payment equal to the amount which would be collected by a charge of \$80 per acre upon such of the project lands as the owners thereof may elect to purchase water rights for."

The authority of the Secretary to make the contract was found in Section 5 of the Reclamation Extension Act.

*"Provided, That whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized, in his discretion, to transfer to such water users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe."*

3. The statements on pages 6, 7 and 8, particularly the comments of the District Court, are not justified by this record. "The necessity for drainage" did not first arise in the District. Neither does Appellant make any claims on the outside Project lands for drainage. It is the duty of Appellant under Idaho laws to provide drainage for all of its

lands. Before the Project was completed and its cost determined, the Secretary had jurisdiction and did construct drainage systems as a part of the cost of the Project, in three irrigation districts, two of which lay entirely outside of the Project. The Project lands, which constitute the highest lying lands on Boise bench, drained down on these irrigation districts. We listed these drainage works on page 25 of our Brief in chief. The first work constructed was in Pioneer District. (See *Pioneer District vs. Stone*, 23 Idaho 344, 138 Pac. 382.) These drainage works were continued into appellant district and the jurisdiction of the Secretary and of the District to make the contract was reviewed in the first case of *Nampa & Meridian Irrigation District vs. Petrie*, 28 Idaho 227, and 153 Pac. 425, then appealed to this Court and dismissed.

## ARGUMENT

### I.

*How May Drainage Be Authorized and the Charges Collected After the Construction Cost of the Project has Been Fixed by Public Notice?*

Examination of the Brief of Appellee, Bond, the decisions of the District Court and the Circuit Court of Appeals, and the public documents of the Reclamation Service, together with the decisions of the Idaho Court in *Pioneer District vs. Stone* and the two *Petrie* cases, and the Circuit Court of Appeals

for the Eighth Circuit in case of the United States vs. Ide (277 Fed. 382) conclusively show that until 1921 the courts and the Secretary of the Interior uniformly held that drainage construction was properly classified as a construction charge of a reclamation project, and that after the construction charge on a reclamation project "has been fixed by public notice," the Secretary of the Interior may not impose the cost of drainage charges upon the landowners of a project "except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen, to be affected by such increase, whereupon all water right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto." (Sec. 4 Reclamation Extension Act of 1914.)

2. The construction charges for Boise Project were fixed by public notice July 2, 1917, and included, of course, the cost of all drainage works as well as other structures, constituting the investment of the Government in Boise Project. In the public notice, Secretary Franklin K. Lane said:

"14. *Expenditure for drainage and distributing works.*—The construction charge as announced herein includes the sum of approximately \$302,000.00 expended and to be expended after January 1, 1917, for drainage and distributing works. The expense of any further work of this kind which may in the future be necessary, must be met by the, landowners

*through an increase in the construction charge herein announced, or otherwise.*" (Italics are ours.)

What the words, "or otherwise," might mean does not appear. But Section 4 provides for "an increase in the construction charge" which may be lawfully required from the landowners.

3. The position assumed by Secretary Fall in 1921 amounts to a complete reversal of the policy of his predecessors regarding drainage. The jurisdiction of the Secretary to construct drainage was implied from the Federal Statute. The first drainage attempted by the Government anywhere on an irrigation project was in the Pioneer Irrigation District and was charged to Boise Project. It may be presumed that the district merely accepted the contract offered by the Government providing for drainage as a construction charge under the irrigation laws of Idaho. The same was true of the drainage in appellant district. Before the Government began any drainage, the right both of the Secretary and the District was determined in the case of Pioneer Irrigation District vs. Stone. The same course was followed in the first case of Nampa & Meridian Irrigation District vs. Petrie, *supra*, which involved validity of the contract. The attorneys for the Reclamation Service appeared as an attorney for the Districts in each of these cases. The State Supreme Court upheld the jurisdiction of both the District



and the Government to construct drainage as a construction charge under irrigation district law, at the instance and solicitation of the Government, through its attorney. When dissatisfied parties appealed the Petrie case to the Supreme Court of the United States both the General Counsel and the District Counsel for the Reclamation Service appeared as attorneys for Appellant District and secured a dismissal of the appeal. It is interesting to notice the declaration of law which the Government was defending when the Petrie case was appealed to this Court, which was as follows:

The Court said:

"Section 2400, Rev. Codes, provides that notice shall be given to each of the landowners of the time and place the board of directors will make the assessment of benefits, when a hearing will be given to each owner of land within the district, and his land will be classified and assessed according to benefits received. Should any landowner make objection to said assessment or any part thereof before said board, and said objection is overruled by the board, and the landowner does not consent to the assessment as finally determined, such objection shall, without further proceedings, be regarded as appealed to the district court and to be heard at the said proceedings to confirm as aforesaid. Like objections may be urged by landowners who may be affected by the drainage system or stored supplemental water rights." (Nampa &

**Meridian Irrigation District vs. Petrie, 153 Pac. 428.)**

This decision assured the individual landowner that he could not be required to pay any drainage charges unless they were voted by the District and the benefits were confirmed by a Court and he was given opportunity to challenge the assessment in that proceeding. In *Nampa & Meridian vs. Petrie*, 223 Pac. 531, cited on pages 28 to 30 of our brief in chief, the Court merely enforced the decision made in the first Petrie case, which was secured at the instance of the attorneys for the Reclamation Service.

4. When the Secretary brought an action in the Federal Court to secure judicial sanction for the construction of drainage works, in case of *United States vs. Ide*, the Circuit Court of Appeals for the Eighth Circuit merely reiterated these Idaho decisions.

5. The decisions of both the District Court and the Circuit Court of Appeals in the case at bar expressly recognize that the Secretary might, if he chose, construct the drainage under consideration by increasing the construction charges as provided in Section 4. The District Court stated the law thus: "The Government has fixed the construction charge upon this system, under the law, and it cannot now add to it without the consent of a majority of all the water users." (R. 35.)

But the Court then proceeds to make an argument which ignores the law itself and assumes a new rule

of statutory construction, under which the terms of the statute may be construed as purely optional. The Court says (R. 35) :

"If, in the management of this great system, with its hundreds of miles of canals, its dams, and gates, and a multitude of devices for diverting, impounding, carrying and distributing water, it cannot in an intelligent way provide for new conditions, or in the light of experience make new and better provisions for old conditions, *by charging the reasonable expenses thereof to maintenance and operation*, the value and efficiency of the system would be greatly impaired. Surely such a result could not have been intended by Congress, or by the parties to the contract here involved." (Italics are ours.)

With the italicized portion stricken out, we heartily concur in the foregoing statement. But is not this just what the Congress of the United States thought when it provided and declared an exclusive method to be followed by the Secretary in meeting an increased construction charge after the cost of the project had been determined?

6. The Circuit Court of Appeals stated the matter thus (R. 58) :

"If not provided for in advance, as was the case here, it can only be provided for by *agreement with a majority of the landowners affected*, or by a maintenance and operation charge." (Italics are ours.)

Here is an admission that drainage construction does increase the construction charge and that said Section 4 does provide that the necessary cost should be authorized and collected in the manner there provided. Probably it never occurred to the Court that the procedure adopted by this statute was not even experimental but is the means by which all irrigation districts and co-operative irrigation systems in the arid regions are managed, and that it is both practical and a demonstrated success. The Court ignores the mandatory provision of this statute and instead of *construing* the statute attempts to give a reason for *nullifying* it. The Court said:

*"The prosecution of the present suit gives little promise that the necessary consent could be obtained, but the power of the Secretary to conserve and protect the property under his charge is not dependent upon any such consent."*

Of course, it is not true that this drainage system will either conserve or protect any of the property of the United States under the charge of the Secretary of the Interior. This Court can take judicial notice that the irrigation canals and reservoirs constructed with public money are all situated above the lands to be irrigated and do not need to be either conserved or protected by drainage works. The drainage works are situated on the low-lying lands, miles away from the irrigation works. The suggestion that the drainage works will conserve or protect the irrigation

works is absurd. In any event, appellee should be required to prove his defense. But suppose we concede it all! *Section 4 provides an exclusive mode of procedure which has proved adequate for the purpose everywhere.* In fact, outside the Reclamation Service of the United States 99 per cent of irrigation works are managed by a majority of the water-users.

In mandatory language, Section 4 declares that "no increase in the construction charges" can be made except with the consent of a majority of the landowners. We assert that Congress meant just what it said, and that the jurisdiction granted to the landowners after the Project has been completed, is just as sacred as that granted the Secretary.

We think the courts should construe the law and leave to engineers the practical operation of irrigation projects.

7. We submit that the Court decision and the records of the Department of the Interior indicate that the Reclamation Service has been practically forced into a false position through the interference of the District Court, in the management of Boise Project. In the long drawn out litigation between the Water Users' Association and Appellee, over construction charges of Boise Project, the Court delivered two "advisory opinions" without directing judgment. (263 Fed. 734; 269 Fed. 159.) It was the avowed purpose of the Court as stated in the de-

cision, to bring about a compromise. While the Court enforced very strictly the right of the Secretary to exercise "judgment and discretion" in the case at bar, in that case it let down the bars completely and discussed and criticized construction charges as if no discretion were vested in the Secretary prior to public notice. The Court went to the point of actually discussing questions of future drainage subsequent to the opening of the Project and *advised* the Reclamation Service how it might possibly proceed, wholly ignoring the provision of Section 4 of the Reclamation Extension Act. The Court said:

"Seepage is one of the natural incidents of operating the system, and it would seem to be plain that the necessary expense of providing drainage to prevent damage therefrom is quite as naturally to be covered by revenues collected for *operation and maintenance* as any other expense to prevent damage from operation. The state law also establishes a legal system for the distribution and collection of the necessary cost of drainage. If there be any doubt as to the practicability of either of these methods of securing such funds as may from time to time be needed, I see no reason why the settlers could not be required, at the time they apply for water rights, expressly to consent to such assessments as may become necessary for the purpose."



Here we have the original suggestion which has ripened into the present controversy.

The case was held without judgment until July, 1921, when the contract found on pages 19 to 31 of the Record was stipulated between these parties. The distinguished engineers of the Reclamation Service had theretofore treated drainage construction as a construction charge. Although the Court suggested that "it would seem to be plain" that drainage expense might be so charged, they refused to rely on that construction of the law, but accepted the suggestion that if they were in doubt "*I see no reason why the settlers could not be required, at the time they apply for water rights, expressly to consent to such assessments as may become necessary for the purpose,*" and prepared this drastic contract, which provides:

"11. It is hereby stipulated and agreed that an amended form of water right application to be provided for and required under the decree in said suit shall contain a provision expressly agreeing to the payment for future drainage work on the said Boise Project as an operation and maintenance charge." (R. 22.)

Under this agreement, which was merely the act of the attorneys and officers of the Water Users Association and not of the individual landowners, instead of paying only the operation and maintenance chargeable by law under Section 5 of the Extension

Act, the individual landowner was compelled to make a new contract including therewith drainage construction.

The decree undertakes to enforce said contract against the Association members—but not against the District—as follows:

“That all of the members of plaintiff upon said Boise Project within said first constructed unit or division shall, on or before sixty days from the date of this decree, execute and deliver to the plaintiff association who shall in turn approve, execute and deliver to the Project Manager of the Boise Project, a water right application in form as that attached to said stipulation and supplemental contract, forming a part of this decree as aforesaid.” (R. 30.)

“It is further ordered and decreed that after the expiration of sixty days from the date hereof the Project Manager may, in his discretion, *decline to furnish water to any member of the plaintiff Association for lands upon said first constructed unit or division outside of the organized irrigation districts* so long as such member neglects or refuses to execute said water right application as aforesaid.” (R. 31.)

Under this judgment and contract, the right of the Secretary to collect drainage as a maintenance charge rests upon the contract of the Association backed by the individual contract of its members. There is nothing to suggest that either the legal or engineering advisers of the Government had changed

their minds as to the status of this expense. The District was in Court as a party to the action. It was treated as having no interest in the proposed drainage. The Supplemental Decree expressly recites that the decree between the Association and the Government "contains no provision disposing of the case as to other parties, and all parties through their respective counsel, now consenting that a supplemental or amendatory decree may be entered on the evidence heretofore adduced," etc., (R. 32) judgment was entered for this appellant.

8. On page 9 of Brief, after quoting from Sections 4 and 5 of the Extension Act, counsel say:

"Neither section throws *any light* upon what are to be considered charges of the one kind or the other."

Will examination of the Statutes justify this amazing conclusion? "Construction charges" are mentioned in Section 4, and Section 5 provides "that in addition to the construction charges." Section 5 speaks of an "operation and maintenance charge based upon the total charge of operation and maintenance of the Project, or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered," which charge is "in addition to the construction charge."

Public Utilities Commissions classify such charges under statutes no more explicit. If necessary they have hearings and make decisions based on testi-

mony. As is well known, the Secretary of the Interior has officially recommended to the President that laws be enacted under which all Government Projects shall be ultimately turned over to irrigation district organizations, although that form of management will be controlled completely by a majority of the landowners exercising the same jurisdiction as is recognized in Section 5 of the Extension Act. We assert that neither this Appellant nor the landowner on the Project who goes into Court to maintain his property rights under the provisions of said Section 4 should be subjected to contemptuous treatment.

We ask this Court to declare the legal effect of Section 4. *Are the provisions of said Section mandatory on the Secretary?*

## II.

*Did Appellant Agree to be Bound by the Decision of the Secretary in Fixing Operation and Maintenance Charges?*

On page 20 of Brief, it is claimed that under the terms of Section 12, whereby the appellant agreed to pay for its Project lands, the same operation and maintenance charges as were paid by similar lands of the Boise Project, the use of the words "as announced by the Secretary of the Interior" constitute a complete *waiver* of the right of the District to insist that the Secretary of the Interior shall perform

his official duty in the manner provided by law. No authorities are cited. We think that a mere statement of the contention furnishes a complete answer. The contract was the official act of the Secretary of the Interior as an officer of the Government. The annual announcement of the operation and maintenance charge is one of his official duties. Is it fair to claim that when he performs such duty in violation of law, those who have contracted with the Government are without remedy or recourse? Appellant did not contract with reference to a pending dispute or for the purpose of arbitration. Counsel admit, however—

“It may be admitted, of course, that if the Secretary in bad faith or by an abuse of discretion announced as an operation and maintenance charge an item of expense which, as a matter of law and by clear and definite decisions, was a construction expense, the District would not be bound to accept his decision.”

We have specifically alleged that the work to be performed and for which the levy was made consisted of the construction of a drainage system and constituted a construction charge. If this allegation is true, it is a direct impeachment of the official act of the Secretary and a charge that he has violated the law. We say it is a direct violation of law, “bad faith” and “abuse of discretion” to classify drainage construction in violation of the statute. We did

not contract for a "determination" by the Secretary but to pay a charge defined by statute which he was to announce in the official performance of duty as a public officer.

### III.

#### *The District as a Unit of the Project.*

Under Subdivision 4, pages 21 to 27, counsel discuss the claim of Appellant as a "unit" of the Boise Project. We think this claim can be determined from an inspection of the contract. Why did the Government contract with the District at all? It was because it was a suitable organization and already had jurisdiction over its project lands for irrigation and drainage. Therefore the Government relinquished jurisdiction over all of the individual land owners in the District. The Government at this time proposes a contract under which this District will be represented as a unit of the constructed project in its joint management and control under terms of recent relief legislation. Section 5 of the Reclamation Extension Act recognizes that a Project may be divided into separate units. The contract provides for a pro rating of operation and maintenance charges. The District is to pay the part thereof properly charged to the interest it has purchased in the water rights. The transfer covers sufficient water for every unirrigated acre of land in the District. We respectfully submit that the terms of the contract itself sufficiently indicate that

the Secretary deliberately and intentionally constituted the District as a unit within the meaning of said Section 5, since otherwise he had no jurisdiction to make the contract at all. The complaint alleges that the proposed drainage is entirely outside of the District. Hence it would not be a proper charge against the lands of the District as a separate unit of the Project even if drainage were an operation charge, since the pleading admits that no benefit whatever will accrue to any of the lands of the District by reason of the drainage under consideration. (Section 10, p. 2, Record.)

The last Petrie case (p. 30 of Brief) the Idaho Court said:

"When the statute provides that land within an improvement district may be assessed for the cost of the improvement in accordance with benefits derived it means benefits derived from the improvement. Where the assessment is for the drainage project, it must be based on benefits derived from it, and not on benefits derived from irrigation."

### CONFLICT BETWEEN THE DECISIONS OF FEDERAL AND STATE COURTS.

The Secretary made this contract with an Idaho public corporation, created by State law and necessarily amenable thereto. Counsel for Appellee seeks to belittle the decisions of the State Court in relation to State law. It is a matter of common knowledge



that the District must respect the State law in assessing benefits and levying taxes. Under the decision of the State Supreme Court in *Petrie Cases*, any land owner in this district may enjoin the District from proceeding contrary to that decision. We respectfully assert that this is one of the cases where the Federal Courts should give great weight to the decision of the State Court. In fact, the decision of the State Court ought to be controlling, since the Government of its own choice and election has deliberately dealt with a State public corporation. Furthermore, the State Court ought to be very familiar with the subject under consideration.

We quote from Volume IV *Encyclopedia of U. S. Supreme Court Reports*:

(P. 1051): "Ordinarily the decisions of the State Court are not to be regarded as laws of the State within the meaning of the Acts of Congress. But where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, they are to be treated as laws of the State by the Federal Court." (Citing cases.)

(P. 1053): "In order for State decisions to be binding on the Federal Court upon the ground that they construe State statutes, they must, in fact, present a case of statutory construction, and must not be confined to the decisions of questions, which are, in effect, questions of general law." *Cross vs. Allen*, 141 U. S., 528, 538, 35 L. Ed. 843; *Cahen vs. Brewster*, 203 U. S.,

543, 544, 51 L. Ed. 310; *Adams Express Co. vs. Ohio*, 165 U. S., 194, 219, 41 L. Ed. 683. "The question as to the construction of a statute must be finally at rest in the State Court in order for the Federal Court to be bound by their decisions. *Thompson vs. Perrine*, 103 U. S., 806, 817, 26 L. Ed. 612."

(P. 1053-4): "Thus the Federal Court in interpreting a State statute will form an independent judgment as to the meaning of the State law, when there is no binding construction of such State statutes by the Court of last resort of the State, but only when the case imperatively demands it." *Pelton vs. National Bank*, 101 U. S., 143, 144, 25 L. Ed. 901; *Michigan Cent. R. Co. vs. Powers*, 201 U. S., 245, 291, 50 L. Ed. 744; *Coulter vs. Louisville, etc., R. Co.*, 196 U.S., 599, 49 L. Ed. 615.

(P. 1055): "When the Supreme Court of the United States has first decided a question arising under State law, it is not bound to surrender its convictions on account of a contrary decision of a State Court, though they will usually do so in cases involving property rights dependent upon the construction of local statutes." *Roberts vs. Lewis*, 153 U. S., 367, 38 L. Ed. 747; *Supervisors vs. U. S.*, 18 Wall, 71, 82, 21 L. Ed. 771; (and other cases).

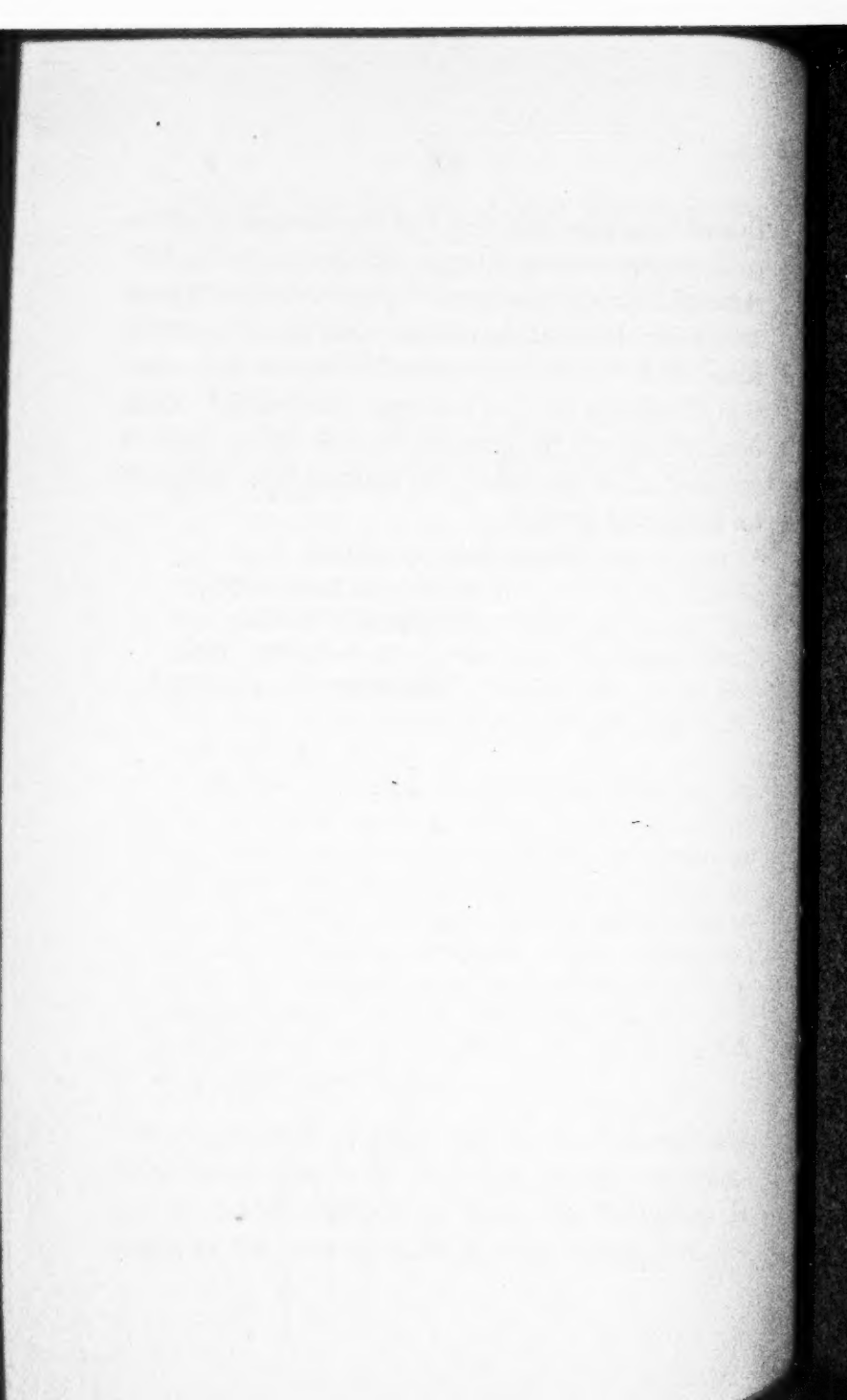
We respectfully submit that in dealing with the Boise Project and with irrigation districts contracting for water rights therefrom, the Secretary is bound by the laws of Idaho relating to the jurisdic-

tion of irrigation districts and the assessment of the cost of construction charges together with the decisions of the Supreme Court in the case of the Pioneer Irrigation District vs. Stone, and the two Petrie cases, and will not be permitted to require an irrigation district to pay for drainage construction which does not benefit the lands of the District or which is imposed as an operation and maintenance charge of an irrigation project.

Respectfully submitted,

HUGH E. McELROY,  
FREMONT WOOD,

Boise, Idaho,  
*Solicitors for Appellant.*



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UNITED STATES OF AMERICA  
DISTRICT COURT OF THE DISTRICT OF COLUMBIA

NO. 100

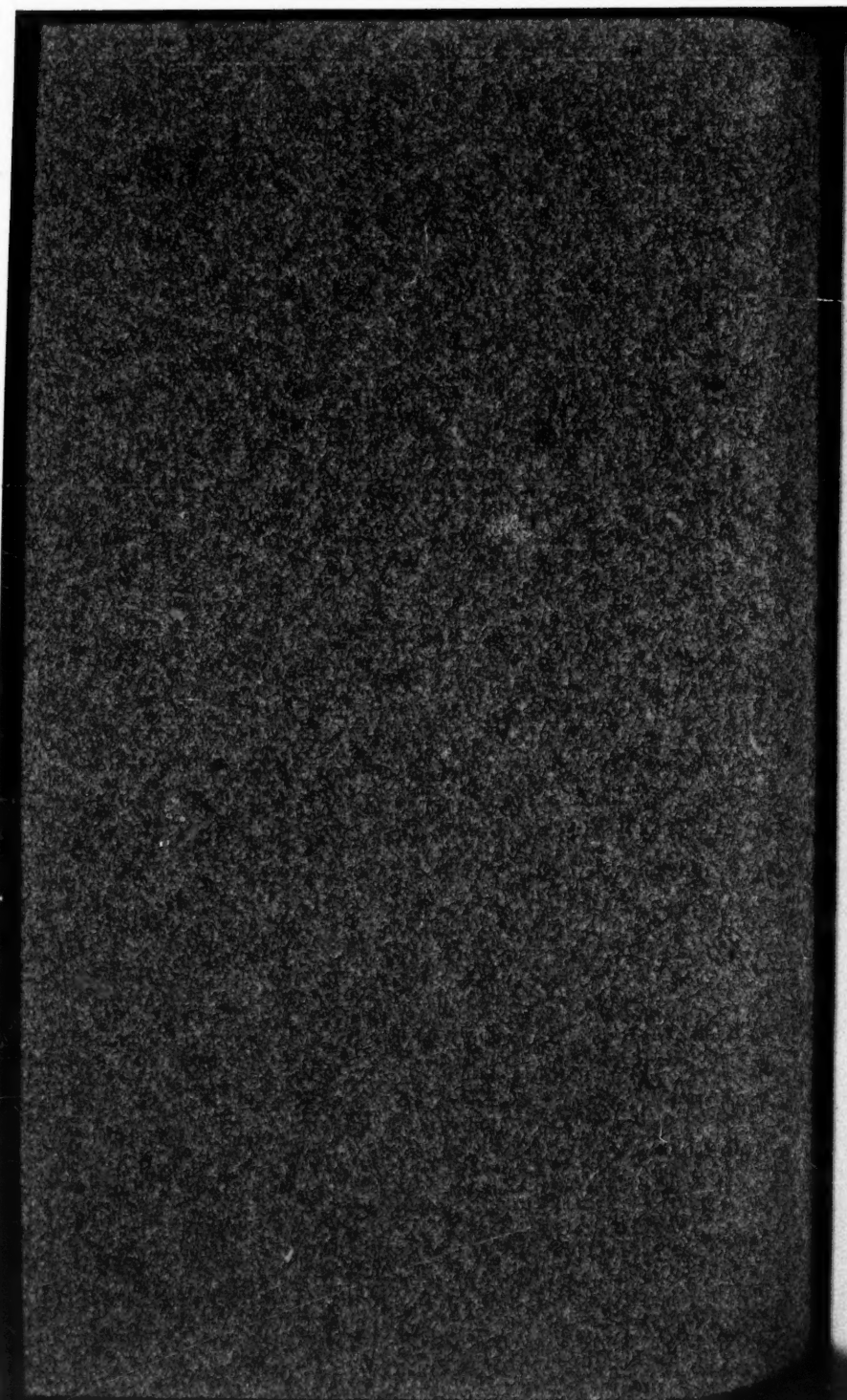
WILLIAM F. BISHOP, Plaintiff

vs.  
UNITED STATES OF AMERICA, Defendant

Presented to the Court for the purpose of setting aside the verdict of the jury in the above entitled case.

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

WILLIAM F. BISHOP  
Of Counsel for Plaintiff



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1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study.

2. The second part of the report is a detailed description of the study area. It includes information about the location of the study area, the population of the study area, and the characteristics of the study area.

3. The third part of the report is a description of the data collection process. It includes information about the sources of data, the methods used to collect data, and the time period over which data was collected.

4. The fourth part of the report is a description of the data analysis process. It includes information about the statistical methods used to analyze the data and the results of the analysis.

5. The fifth part of the report is a discussion of the results of the study. It includes a comparison of the results of the study with the results of previous studies and a discussion of the implications of the results for future research.

6. The sixth part of the report is a conclusion. It summarizes the findings of the study and provides recommendations for future research.

7. The seventh part of the report is a list of references. It includes a list of all the sources of information used in the study.

IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1924.

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**No. 135.**

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NAMPA & MERIDIAN IRRIGATION DISTRICT,  
APPELLANT,

*vs.*

J. B. BOND, PROJECT MANAGER OF BOISE PROJECT OF THE  
UNITED STATES RECLAMATION SERVICE, AND PAYETTE-  
BOISE WATER USERS' ASSOCIATION, LTD.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH DISTRICT.

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**SUPPLEMENTAL REPLY BRIEF FOR APPELLANT,  
NAMPA & MERIDIAN IRRIGATION DISTRICT.**

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**Statement.**

The extraneous matter brought into the discussion of this case seems to have occasioned some confusion of thought. In the briefs of appellees, and especially in the oral argument, many of the facts as applied to the issues are so inac-

curately stated as to be highly misleading. The indulgence of this Honorable Court is therefore asked that we may present this our supplemental reply brief, with a view to aiding in determining the law and facts involved.

The motion to dismiss necessarily concedes the accuracy of all the material averments in the bill of complaint. We are justified in assuming, and do assume, that this cause will be determined upon the facts presented by the record, unaffected by extraneous matters.

### **Facts—Issues.**

The Boise Project, herein called "Project", embraces about 165,000 acres. These lands are situated in Boise Valley and substantially all lie between Boise and Snake Rivers and derive their water supply from the Boise River. The water is supplied and its distribution regulated by two reservoirs, the larger being known as the Arrow Rock Reservoir, situated on the Boise River about 40 miles above the Project. The other, known as the Deer Flat Reservoir, is located in the southwest part of the Project on the high lands near Snake River. The Arrow Rock Reservoir waters are impounded by a dam in the Boise River, while the Deer Flat Reservoir is within the Project and receives its water through a feeder canal taken out of the Boise River.

For convenience of the Court copies of official maps from the Reclamation Service are furnished herewith, showing the location of all streams, reservoirs, canals, and much other data essential to a proper understanding of the cause presented—of all which it is assumed the Court may take judicial cognizance. From these maps it will be observed

that only a small part of the lands within and under control of the appellant district are below the Deer Flat Reservoir, and that the district lands drain northwest towards the Boise River. The Golden Gate, Wilder Arena, and Deer Flat Sections, mentioned in paragraph 10 of bill of complaint (Tr. p. 2), are in the lower half of the Project, below the Deer Flat Reservoir, and also drain northwest and cannot (under the laws of gravitation) be affected by seepage from irrigation within appellant district. Under the irrigation-district laws of Idaho, the lands within the district and over which the District may, within its legal scope, have control are not necessarily contiguous. Less than 9,000 acres are below Deer Flat Reservoir and, assuming the seepage to follow in the direction of the Government canal taken from the Deer Flat Reservoir, the possibility of these lands contributing to the necessity for drainage is reduced to a minimum.

For the Court's convenience the clerk is supplied with copies of "Handbook of Irrigation Laws" (by King and Burr). It will be observed that under the Irrigation District Laws of the arid States irrigation districts are *quasi-municipal* in character, similar in corporate authority to school districts, but much more extensive in their scope.

The appellant, Nampa-Meridian Irrigation District (herein referred to as "District"), is a *quasi-municipal* corporation having for its purpose the management, control, and distribution of the water supply essential to the successful farming of the lands within its confines. This District was organized and in operation under the laws of Idaho before the Boise project was undertaken and has a prior right to a water supply for the irrigation of 25,000

acres of land. This supply was received by means of its canals taken directly out of the Boise River, constituting what are known as "the old water rights". As a supplement to these old water rights, the District purchased, under what is known as the Warren Act (Tr. p. 9, par. 9), additional water to meet the late-season shortage in connection with its old rights. This water, however, and that of the "old rights" were used without separation from the regular water rights acquired from the Government for certain other lands in the District previously arid.

After the construction of the Arrow Rock and Deer Flat reservoirs, the Nampa-Meridian Irrigation District, desiring, in addition to said supplemental water supply, the drainage of a considerable acreage, negotiated with the U. S. Reclamation Service for the required drainage and for the purchase of the supplemental water supply described. This resulted in a contract therefor executed June 1, 1915, between the Government and the District, referred to in the complaint as Exhibit A (Tr. p. 5). Under this, the first contract, the District agreed to pay \$266,000.00 or 266/557th of the *estimated* cost of drainage system for the Project, being its agreed proportion of the drainage for the entire Project, estimated to cost about \$557,000.00. This drainage system was requested by and constructed for the Project and District.

The \$70.00 per acre payments provided for in the District contract cover all charges for its 2/7ths of the drainage system of the entire project; the District further agreeing (Tr. p. 8, par. 4) that after construction it "will maintain said drainage system in good serviceable condition at its own expense \* \* \*." This provision would seem to obviate the necessity for any notice for operation and maintenance on account of

the upkeep of the drainage when constructed. In this connection let it be noted we do not question that where no provision is made by water users for the care, upkeep, operation and maintenance of a drainage system after once constructed (as was done here), charges for the necessary care and upkeep, cleaning out of drains, maintaining the banks of the drainage canals, etc., may be charged as operation and maintenance—as in the case of the maintenance of the constructed canals for conveying water to place of distribution—but this *may not be done with respect to cost of the construction of the drainage canals in the first instance.*

After the delivery of the water by the Reclamation Service to the head of the District's main distributing ditches, the District becomes the exclusive manager and operator of the system through which water is distributed to the lands within its boundaries; also the collector of all annual installments on construction charges, together with operating and maintenance charges as they become due, the assessments for payment of which are levied and collected under the irrigation-district laws of Idaho and by the District paid to the Reclamation Service.

The District also agreed to "withhold the delivery of water from such of the lands in the District as may be in default in the payment of said *operation and maintenance* charges." No authority is designated, authorizing the Reclamation Service to shut off the water supply in case of default in deferred payments. The power to shut off the water in case of default in such, or in any overdue payments, rests solely with the District itself. Nor is there any provision in the U. S. Reclamation laws authorizing the collection of funds due the Government from the District on construction or other charges,

except the provision in Section 6 of the Reclamation Extension Act, which reads:

“\* \* \* no water shall be delivered to the lands of any water right applicant or entryman who shall be in arrears *for more than one calendar year* for payment of any charge for operation and maintenance or any annual construction charge or penalties.”

As a result of the irrigation system of the Boise Project it appears that the water table has been rapidly rising in portions of the project *outside* the Nampa and Meridian Irrigation District, on the lower half of the project and below the District, “particularly the Golden Gate, Wilder Arena, and Deer Flat sections” (Tr. 2, par. 10), being substantially all below and not affected by irrigation of lands within the District. (See maps—topography.) The Secretary accordingly deemed it advisable to extend the construction of the drainage system and has so authorized. But in place of directing the expense of constructing this additional drainage system to be charged against the Project as a “construction charge,” the Secretary has designated it as “operation and maintenance” charges, is proceeding to collect on that basis, and on February 15, 1921, issued a public notice to that effect.

All “operation and maintenance” charges have been paid by the District, *except* that part, claimed as such, expended and proposed to be expended in the *construction of drainage works*. The proposed drainage works are for the exclusive benefit of lands outside the district and for the benefit of other sections and units from which the District will receive no benefit.

No part of the sum so demanded of the District, men-



tioned herein and of which the District here complains, has been or will be used for the maintenance or operation of the canals, reservoirs or dainage works within the District for its benefit—its use is to be for a new drainage system, additional to the drainage system already constructed pursuant to the District's contract "A." The District refuses to pay for this additional drainage charge whether designated as "construction charges" or under the misnomer "operation and maintenance." Because of this refusal, the appellee, Bond, who is in charge of the Project for the Government, threatens to turn off, and refuse the delivery of, the water purchased for the lands within the District, claiming to act under the contract mentioned.. Hence this suit.

### **ARGUMENT.**

Our contention, in a nut shell, is this: We have not contracted to pay the sums in question, and that they have been designated "operation and maintenance charges" as a subterfuge and in order to make a color of right for the collection thereof from the District. This is a violation of our contract, is not necessary to the success of drainage for the Project, and is contrary to the irrigation and drainage law and institutions of the State of Idaho, as we shall show.

This case then involves the construction to be placed upon the words "operation and maintenance" or what charges may be designated as such, as distinguished from "construction charges."

If there is any distinction in meaning between "construction" and "operation and maintenance" such as gives these terms any significance or legitimate place in a contract, we submit that charges for the same kinds of building job can-

not be "construction" today and "operation and maintenance" tomorrow simply because, meanwhile, a contract which has been made which purports to obligate certain landowners to pay "operation and maintenance" charges. Contracting parties are not presumed to use terms in a manner so meaningless or vacillating.

The first attempt at distinguishing these two expressions under the Reclamation Act appears in the case of *Baker vs. Swigart* (196 Fed., 569; reviewed 199 Fed., 865; affirmed 229 U. S., 187; 57 L. Ed., 1143), in which it was held that during the interim between the commencement of construction work and the issuance of the public notice announcing the completion of a unit or units of a project, the expense incurred in the operation of the irrigation works while being completed would properly come under what are termed "operation and maintenance" charges, which the owners of the lands are obligated to pay under their water-right subscription contracts.

Later, drainage systems were found essential to the successful completion and operation of the reclamation projects. The cost of this class of reclamation from the outset and until the issuance of the public notice of 1921 (Exhibit C) was charged to and carried in the "construction charge" account. It was so understood at the time of entering into the contracts (Exhibits A and B) between the Government and the District, and thereby impliedly so construed and contained therein. The proportionate part of the drainage to be paid by the District under its contract was included in said contract as "construction charges" and not as "operation and maintenance charges," and the District has been paying, and the Government receiving, all moneys due therefor as such.

It would thus seem too clear to admit of serious doubt that the statement in the contract (Tr. p. 11), "The project lands in the district shall pay the same operating and maintenance charge per acre as announced by the Secretary for similar lands of the Boise Project," etc., was understood by all concerned to have reference only to "operation and maintenance", not only as applied by the Supreme Court of the United States in *Baker vs. Swigart*, 229 U. S., —, but as the understood and recognized policy of the Government invoked by it throughout the entire history of the Reclamation Service—the conclusive proof of which will herein later appear.

The parties to the contract are also presumed to have had in mind the provisions of the Reclamation Extension Act of August 13, 1914 (38 Stat., 686), with subsequent amendments, which, with its expressed limitations, all became as much a part of the contract as if specifically stated in it. Section 4 of this Act expressly states (all italics in this brief being ours) :

"That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase. \* \* \* Such increased charge shall be added to the *construction charge and payment thereof distributed over the remaining unpaid installments of construction charges.*"

Further provision is made for the manner of payment, which manner is inconsistent with, as well as impracticable under, the public notice herein complained of.

Less than a year later, and prior to the execution of either of the contracts with the District, we have the Act of March 3, 1915 (38 Stat., 861), placing further restriction upon the imposition of additional charges, a part of which reads:

"No work shall be undertaken or expenditures made for any lands, for which the construction charge has been fixed by public notice, \* \* \* unless and until valid and binding agreement to repay the cost thereof shall have been entered into between the Secretary of the Interior and water-right applicants and entrymen affected by such increased cost, as provided by Sec. 4 of the Act of August 13, 1914, entitled 'An Act extending the period of payment under the reclamation projects, and for other purposes.' "

Section 5 of the Reclamation Extension Act provides, in addition to the construction charges, for the payment of

"An operation and maintenance charge based upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made for each acre of water delivered, but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for not less than one foot of water \* \* \* "

This provision was merely declaratory of the law as applied by this Court in *Baker vs. Swigart*, *supra*, removing thereby all doubt concerning the legality of the policy of the Reclamation Service on the subject. It will be noted that these terms, "operation and maintenance", as there stated, have reference to the expense incurred in water delivery. Such

being the basis of the whole charge so designated—and were manifestly there used in the sense applied in the Baker-Swigart decision and had been universally recognized prior to its enactment. No different application of these terms was ever thought of or brought into question in any manner until the issuance, February 15, 1921, of the public notice here involved.

### **Authority to Issue the Public Notice.**

#### **LIMITED TO LANDS OWNED BY STOCKHOLDERS IN INTER- VENER'S ASSOCIATION.**

The authority of the Secretary to issue and enforce the terms of the public notice involved is not questioned, in so far as the intervener, the Payette-Boise Water Users' Association, may be concerned. The intervener does not challenge it, nor do we, *as applied to it*. But the authority does not extend to any other person or organization named in the record.

#### **WHY THE JURISDICTION IN THIS INSTANCE, AND WHY LIMITED?**

Because the intervener corporation has by contract (Tr., Ex. D, Sec. 10, p. 22) in express terms authorized it. To this contract appellant was in no respect a party and has not given its consent thereto; and the District's consent thereto cannot be implied, either under the reclamation law or under the law governing contract relations. This authorization, so far as the intervener association is concerned, expressly ap-

pears in Exhibit D of the bill of complaint, beginning on page 19 of the transcript. Attention is also called to Exhibit A thereof (Tr. p. 26), which must not be confused with appellant's contract "A" on page 5 of transcript. This unusual provision in the contract between intervener's association and the Government, with subsequent developments, reflects much light upon why the confusion on the challenged action of the Secretary.

The District was in no sense, either directly or indirectly, a party to the "Exhibit D" stipulation. But because of the statement in the District's "Exhibit A" contract that it would "pay the same operation and maintenance per acre as might be announced" for similar lands of the Boise Project, etc., it seems to have been erroneously assumed that the Secretary is authorized to change the well-established meaning and usage of the words "operation and maintenance charges" so as to include such construction work as he might designate. The quoted provision of appellant's contract, upon which appellees seem to rely, was entered into June 1, 1915, or more than six years prior to the intervener appellee's "D" stipulation (Tr. p. 19).

Not until intervener's "Exhibit D" contract was executed was the policy of charging what at all times previously had been universally recognized as "construction charges" brought under this new classification and under the much-extended application of the phrase "operation and maintenance charges." It is thus manifest that the public notice was issued solely under the terms of the "Exhibit D" contract and accordingly not intended to affect the lands of those not a party to it. It is presumed that the Secretary intended to follow the law, not to change it by a play upon words, based

solely upon a stipulation in a contract to which none other was a party.

To sustain appellee's contention would be to hold that the Secretary, by the mere publishing of a notice over his signature, may not only disregard the well-established and judicially recognized distinction between, and application of, the expressions "construction charges" and "operation and maintenance," respectively, but may plow around Section 4 of the Extension Act of August 13, 1914, with its further emphasized inhibition against increasing construction charges without the consent of a majority of the affected landowners, contained in an amendment in the Act of March 3, 1915: (1) by simply changing the prefix to the "charges" account, (2) because the one party (the intervener herein) has agreed to the new designation of the charges, regardless of the wishes of the District, not a party to the new and very extended application of terms.

Exhibit D of the complaint also discloses, among other things, that the intervener (Payette-B. W. U. Asso.) had a suit pending between it and the United States, in which the "advisory" opinion of Judge Deitrich of the Federal court (on which no judgment was entered) reported in 263 Fed., 734; 269 Fed., 159, proved inimical to its contention on important matters there involved. It appears that in order to recuperate to some extent from the effects of this decision, the Association entered into a stipulation with the Government, through the U. S. Reclamation Service, by way of a compromise—instead of appealing the case—whereby some advantages were to accrue to it, and at the same time executed a new contract more satisfactory to the United States. This instrument makes the Government more secure as re-



gards the money returns under the obligations of said Association, from the payment of which, to the extent of several millions of dollars, the Association had been endeavoring by said suit to make its escape. Among other things, intervener's Association was to receive extra benefit by reason of some additional drainage, to secure which it then and there promised to pay for same as "operation and maintenance," thereby conceding and consenting that the drainage costs might be brought within the use of those terms as announced in the public notice of the Secretary (Exhibit C, complaint, Tr. p. 17). The brevity of the interval elapsing between the execution of this contract and the issuance of the public notice, along with other circumstances, reasonably justifies an inference that negotiations had been going on to that effect, leading up to the compromise of this suit in this manner before the public notice was issued, and that the public notice of February 15, 1921, was issued with that end in view and intended to be limited in its application accordingly.

However, after all the concessions thus made by the Water Users' Association—that is to say, its promise to pay all subsequent drainage as "operation and maintenance"—it is but reasonable to assume that the intervener's Association felt little concern about the heavy annual obligations to ensue, so far as early payments were concerned. Section 4 (Tr. p. 23) makes provision for revision of such matters every five years. Section 18 (Tr. p. 25) says, in substance:

"Well, if a majority don't want to pay this \$200,000.00 for canal construction charges, as supplemental construction, we will just pass it over and a proper credit will be allowed at the next readjustment date."

Also, that the landowners, rather than pay the cost of new drainage, would give the necessary *majority* consent, for to do so would spread same over a 20-year period, with probability of the Secretary's permitting the first installment to begin at the expiration of the 20-year period, etc., *ad infinitum*. The surface appearance of generosity in consenting to drainage being called "operation and maintenance" is entitled to little weight. In fact, it would seem that, so far as this feature is concerned, they merely "walked right in" soon to "turn right around and walk right out again."

#### PUBLIC RECORDS—JUDICIAL COGNIZANCE OF.

The Court may take cognizance of the published records of the proceedings of the Reclamation Service. As before urged, these contracts (Exhibits A and B, Tr. pp. 5 to 13) were executed at a time when the fixed policy of the Reclamation Service was to class building of drainage works only as *construction work*. As held in *Baker vs. Swigart, supra*, such matters should be taken into consideration in determining the intent of the authors of the document to be construed. Reference to reports of data, however, happens to be unnecessary. On this feature, attention is directed to that part of Exhibit D of the bill of complaint (Tr. pp. 45-52) containing report of the Director and Chief Engineer, filed as late as December 16, 1922, seven years after appellant's contract, giving a statement of the cost of the entire Boise Project as \$12,732,148.56, of which (see grouped items, Main Brief, p. 25) \$927,374.60 was *drainage costs* carried on the books, reported and charged against all lands receiving

water within the Project as cost of construction and listed as "construction charges."

What is meant by "construction charges" as distinguished from "operation and maintenance" has also become well understood through a consistent line of decisions covering a long period of time, in the State of Idaho, as well as elsewhere. In the early history of the Service, doubt existed with reference to the authority of the Secretary to construct drainage systems under the Reclamation law. Actions were brought for the purpose of settling that doubt. The Idaho decisions on the subject are collaborated on pages 25, 26 of appellant's main brief. These authorities are cited with approval in *U. S. vs. Ide*, 277 Fed., 382, decided by the Circuit Court of Appeals for the Eighth Circuit, in which the Court observed:

"It is well settled that the plaintiff may construct drainage works as a part of its irrigation system.  
\* \* \*"

The first case there cited was decided by the Idaho Supreme Court January 4, 1912, the second February 10, 1913.

The case at bar was decided by Judge Deitrich, of the Federal bench, on June 26, 1922, and affirmed by the Court of Appeals on April 23, 1923. On March 3, 1923, the Supreme Court of Idaho, in Nampa-Meridian Irrigation Dist. *vs. Petrie*, 37 Idaho, 45, held that expenditures for drainage purposes were "construction charges", following the decision in *U. S. vs. Ide*, 277 Fed., 382, decided December 7, 1921. Yet neither of these cases is referred to by Judge Rudkin in the decision from which this appeal is taken, clearly disclosing that the same were overlooked in his con-

sideration of this question. Nor does Judge Deitrich's attention seem to have been invited thereto.

In *U. S. vs. Ide, supra*, special reference is made to drainage works as a part of "the irrigation system", clearly implying that expenditures therefor must be charged as construction. In the Petrie case the Court refers to two of the earlier cases, *Pioneer District vs. Stone* and *Nampa-Meridian Dist. vs. Petrie, supra*, and says:

"There is nothing in the opinions to indicate that the District can charge the cost as an operating assessment and make a flat assessment."

On rehearing in the case of *Nampa-Mer. Irr. Co. vs. Petrie*, 37 Idaho, 35, the Court again emphasized its position in a statement to the effect that the respondent there was acting on the theory that the expense of drainage was a part of the maintenance or operation cost, and observed: "*This theory we cannot approve.*"

In view of the foregoing considerations, there should be no doubt that the entire course and policy pursued by the Reclamation Service and adopted by the Supreme Court of Idaho was to classify all costs of building drainage systems as "construction charges"; that this policy was in force when contract "A" and supplemental contract "B" were entered into by appellant, and therefore must be conclusively presumed to have been so understood by the parties to these contracts; that cases cited disclose this policy as having been recognized by all decisions bearing on the subject subsequent to the dates of said contracts, <sup>as in all the cases</sup> and by all decisions in point since the date of the issuance of the public notice of 1917.

Unless, then, there were some provision in the Reclamation law, accepted by the District, authorizing the Secretary to exercise his discretion in this regard and thereby to modify the provisions of the contract, in open disregard of the established and clear understanding in the minds of the parties at the time of its execution, the facts stated in the complaint are sufficient to constitute a cause of action and to merit the relief prayed for. That the Secretary does not have this discretionary power seems too well settled by the authorities cited in complainant's main brief (pp. 12-17) to admit of serious consideration. These authorities should require no further elucidation.

THE PUBLIC NOTICE, LIKE EQUITY, MUST FOLLOW THE  
LAW.

In this instance, the public notice sought to evade the law by a change in the terms of expression.

Published official documents of the Interior Department disclose that during the pendency of all cases in which the foregoing decisions were rendered, counsel for the Reclamation Service, including the writer as chief counsel, from March 13, 1913, to June 20, 1920, maintained that the Government under the Reclamation law has implied authority to construct drainage systems in connection with the reclamation projects when deemed necessary, and that the costs of such construction come within the terms "construction charges", not operation and maintenance. All engineers of the service proceeded, and all reports made by them were approved by the Secretary, on that basis. Nor, as stated, was this policy questioned prior to the inception

of negotiations for compromise of intervener's suit, culminating in the "Exhibit D" contract. Under this contract, a new rule was introduced constituting an attempt, whether conscious or otherwise, to evade the law, or—to take a more charitable view—to interject an exception by waiver, as applied to intervener's interest, in order to meet "the exigencies of the occasion".

The public notice itself does not necessarily change the well-established rule invoked by the Department. It is presumed to have been intended to have application in harmony with all outstanding contracts, including the laws of the respective States where invoked; not in contravention to them. Only by contract may these provisions be waived, and thus far the intervener alone has become a party to a contract of that type, and to the intervener alone does the public notice here apply.

### **Future Drainage Problem, Solution of.**

But, we are asked, How shall the Government collect costs in the future for such drainage as was not originally anticipated—in cases of a class of which the execution of appellant's contracts limiting the cost to \$70.00 per acre is an example—unless the same may be charged to "annual operation and maintenance" account?

Inquiries on this point would seem to imply that, if our position is tenable, it must follow that the Government can not proceed with further drainage under the contract as it is; nor can the Government proceed under the law, because the securing of the consent of a majority is not feasible, etc.; therefore, further drainage cannot be had at all. This

premise would seem not unlike the classic syllogism urged by the sophist, seeking to prove motion impossible, on the assumption that "a body cannot move in the place where it is, nor can it move in the place where it is not; *ergo*, it cannot move at all"—overlooking that said body may move from the place where it is at one moment to the place where it is not at another moment.

Thus seems the dilemma here: The Government may not proceed with drainage under Section 4 of the Extension Act (Aug. 13, 1914) and the amendment thereto of March 3, 1915, if the water users, by refusing to consent, choose to continue without drainage; and it cannot proceed with such consent, because consent cannot be obtained; hence the situation, it would seem, must remain *in statu quo*. However, a method by which we may be extricated from this assumed situation is available. Its solution, after mature deliberation, was presented by Congress to the Reclamation Service and to those dealing with it, through the medium of the Reclamation Extension Act. The Act, with amendments, presents an adequate system for securing the necessary consent and for providing the return of the cost of such new and unforeseen necessity for drainage and other construction work which may from time to time be needed. To conjure up such a dilemma, therefore, is but to borrow trouble. The matter is a legislative problem, not a judicial one, and the solution provided by Congress, if insufficient, is not for the courts to change by interpretation—the language of the Act is clear. It is not open to construction.

Under Section 4 of said Act, future drainage systems may be constructed and charged to "supplemental construction". The payments therefor may then be distributed by the



Secretary over the remainder of the 20-year reclamation period, or

" \* \* \* the Secretary of the Interior, in his discretion, may agree that such increased construction charge shall be paid in additional annual installments \* \* \* (which) as so agreed upon shall become due and payable on Dec. 1 of each year subsequent to the year when the *final* installment of the construction charge under such public notice is due and payable" (38 Stat., 687).

Under this authorized policy, it will be seen that the necessity for charging this cost as "operation and maintenance" is obviated.

It will be found, too, when we take into consideration the human element, how all men naturally proceed when their interests are involved, that these property owners will do what appears to be to their best interest. If drainage is found necessary for the preservation of the land affected, it must follow that the majority will consent, in order that their property may not become worthless. It is not to be presumed that a farmer will saw off the limb between himself and the tree, as would be implied by the assumption above considered. It is but reasonable to presume that the landowners would, as a matter of self-preservation, consent to the construction of drainage in all instances as needed and as rapidly as found essential for the protection of their lands; their immediate necessities always precede or outdistance any serious alarm to the Government in so far as the material endangerment of its securities may be concerned. The farmer never looks with favor upon "hunger strikes".

The reason why the District refuses to pay a share of the costs of building these drainage works is not by way of an exception to the rule of human nature we have just outlined, but consists in the fact that the District declines to pay for the building of drainage works which do not benefit district lands, as shown by the complaint. The rule of human nature as to the saving of property applies in vastly diminished force to the saving of the property of others who seek protection at the expense of the one not to be benefited.

It should be kept in mind that contracts are made by districts where irrigation districts exist; in the other instance they are made by water users' associations. Only through one or the other of these agencies is Government reclamation carried on. Within the districts the District deals with the individual tract of land. The water users' associations deal with the individual landowners as stockholders. The statutory requirement of the consent of the majority, as treated by the Government, has reference in the case of a District to the majority of landowners therein; in case of a water users' association, it has reference to a majority of the stockholders in such association. From this it must follow that a decision of a majority of an association cannot bind any of those in a District, nor the action of a District in this regard have any binding force and effect upon an association.

UNITS NOT REQUIRING DRAINAGE SHOULD NEVER BE REQUIRED TO PAY FOR THAT WHICH THEY DO NOT MAKE NECESSARY AND FROM WHICH THEY RECEIVE NO BENEFIT.

The law requiring the landowner's consent is manifestly intended to protect units of a project not needing drainage

from the imposition of costs, as here attempted, for drainage which would in no way benefit them, as the bill of complaint alleges to be the situation in this instance. An inspection of the maps makes it clear that the particular lands upon which the proposed drainage system is to be constructed (the Golden Gate, Wilder Arena and Deer Flat sections or units in the lower half of the Project) are outside of the District; also that the District, when topography of the surrounding territory is considered, can in nowise be benefited thereby.

It is manifest that farmers will not only consent to, but seek, drainage relief at a much earlier date and with less emergency existing therefor, where the payments are to be distributed over a 20-year period in annual installments, or, as is frequently done, made to begin at the expiration of the 20-year period, than they would when charged operation and maintenance in addition to the usual operation and maintenance charges essential to the upkeep and running expenses, etc.

The long-term payments, in the exercise of the Secretary's discretion, may begin at the close of the 20-year period without interest. Both the Secretary and the users of water may "give and take" on these matters. Ordinary business prudence would insure the desired consent. It requires little foresight to see that any farmer with average judgment would recognize and accept an advantage which allows him a long term of years in which to begin payments for drainage, rather than sacrifice a home farm which it required years to develop. The long term has "worked" in practice, in every instance where tried; it will continue to "work" successfully where tried in the manner provided by law for that purpose.

But we are reminded, in the opinions of the courts below, that "the prosecution of this suit gives little promise that the consent could be obtained \* \* \*." This assumption is based upon a false premise, especially so when considered in the light of laws enacted by Congress to meet the problem. It implies that men of ordinary prudence will not accept a desired benefit because of its cost, even though obvious that the preservation of their property, its continuous yield of crops, and a proportionate enhancement in farm values may depend upon such acceptance. Humans do not proceed in that way. There is not an instance on record since the enactment of the Reclamation Extension Act to justify such an assumption.

True, in this case the consent is refused. The complaint states adequate reasons therefor, fully justifying the refusal, but it does not follow that when drainage will prove beneficial and essential to the preservation of the farmers' rights they will spurn the benefits afforded under the Extension Act. To apply the reasoning invoked by the courts below is to beg the question; it is to hold that the facts presented are untrue. This in the face of the motion to dismiss, which concedes them. It is to try the case on the extraneous facts, not upon the admitted averments, and, in the opinion of the writer, upon a theoretical assumption of facts not in harmony with the usual business experience among men. As to this suit, consent has not been asked in manner pointed out by law. The Secretary's action is not only arbitrary, but imposes upon complainants an annual flat \$1.00 per acre assessment to continue for all time *unless the Secretary should eventually conclude otherwise*. The logic of the opinion appealed from—for the reasons suggested why consent of the majority cannot be had—applies with equal force to the Secretary and "gives little promise" in this regard.

The contract limits the cost per acre to \$70.00 for construction, including drainage thus far. The law, expressly and in unequivocal terms, guarantees this limitation until a majority of the landowners deem it to their advantage to consent.

Now, the irrigation districts which exist on Government projects, or being adjacent or near thereto, contract with the United States, are the creatures of the States in which their lands lie. They have no method of collecting revenue for building works, paying off bonded indebtedness, defraying debts to the United States, or providing for the operation and maintenance of irrigation and drainage works, except such methods as the local Legislature has provided. In general, and particularly in Idaho, that method is by assessment and levy, similar to the methods of other quasi-municipal corporations.

But it comes about that consent is expected to an unlimited annual flat-rate assessment of \$1.00 per acre, regardless of benefits, *in clear violation of the laws of the State* where the lands are situated, which laws require assessment in proportion to the benefit received. As to these benefits, the Idaho courts say:

"Where the assessment is for drainage, it must be based on benefits derived from it and not benefits derived from irrigation" (*Nampa Mer. Irr. Dist vs. Petrie*, 37 Idaho, 45).

Yet the contract requires the District to collect the assessments, which can only be collected under and in the way provided in the laws of Idaho. But now, six years later, the public notice imposes a charge to meet which requires

an assessment on a basis precluded by the law under which it must be levied—"an irresistible force coming in conflict with an immovable wall."

Furthermore, the Idaho laws say assessments may be made only on a basis of the benefits received. Under the conceded facts, there are no benefits. No assessments, even under the terms of the public notice, are due or can become due. Then, whence comes the authority to shut off the water supply, for which mandatory injunction is here sought? The District is to be left helpless unless this Court afford relief.

The \$1.00 per acre demanded under the public notice to prevent the shutting off of the water, is in addition to a large sum per acre, payable annually for the usual operation and maintenance charges. The necessary and admitted *legal* charges have been paid, but another charge is demanded. This addition of \$160.00 annually to the farmer's burden is no small item.

To all this, consent is refused by this suit, and we submit that it is unfair to infer therefrom that consent could not be procured from the owners of land benefited, when needed, under the favorable and more practical conditions pointed out in the Extension Act. To meet such emergencies, that Act was passed. The motives of complainants should not be questioned, nor the complaint treated as indicative of a lack of fair dealing because they protest against a procedure demanding that they forego the protection guaranteed them by a law enacted to meet such emergencies, and for the common good, and because they insist upon the rule of fair dealing embodied in the Idaho irrigation district laws, which provision insists that those who benefit from the building of

drainage shall pay for them and shall pay in proportion as their benefit shall appear.

The opinion concedes—quoting with approval from an authority on the subject (*Schmidt vs. Louisville, C. & L. Ry.*, 84 S. W., 318)—that

“There is no rule of law declaring what constitutes operating expenses. That is to be determined by the testimony as to each item of expense and is determinable like every other fact.”

This concession, under the *admitted* facts, severs the “limb” upon which the opinion appealed from in part rests. If further data are deemed essential, fully to ascertain whether new proposed drainage expenditures legally come within the provisions of the public notice, the cause should be remanded for that purpose, following thereby the practice invoked in *Kansas vs. Colorado* (185 U. S., 148; 46 Law Ed., 834). To this action, if deemed important, appellant is not averse. The writer, however, is impressed with the thought that the far-reaching effect which the decision in this case may have upon the numerous other and like projects now operating under the reclamation law, and yet to be developed, presents a situation such as to justify an assignment of the case for reargument.

We think that under the facts conceded by the motion to dismiss the decree the Court of Appeals should be reversed and the relief prayed for granted.

Respectfully submitted,

WILL R. KING,  
*Of Counsel for Appellant.*

(5794)

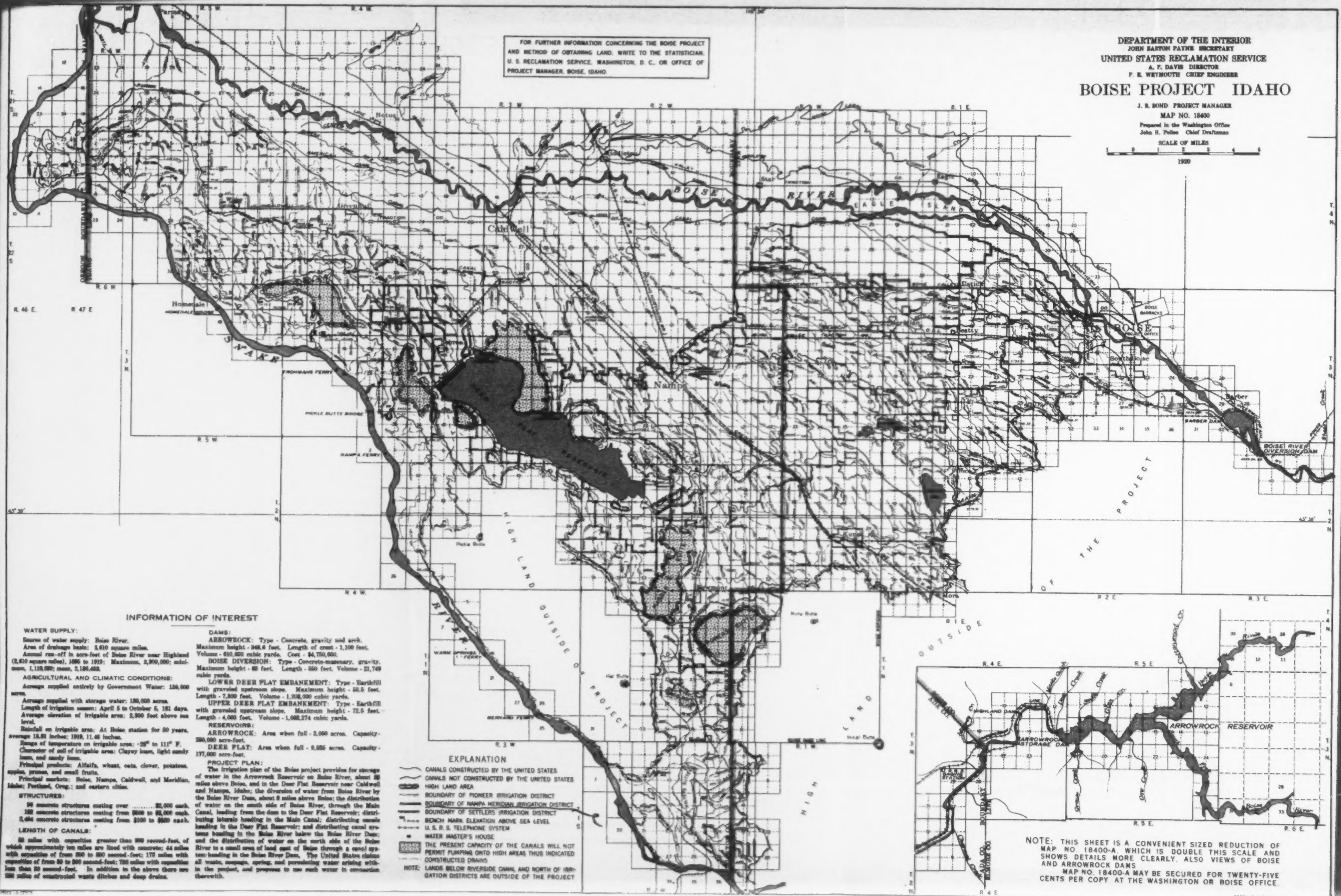
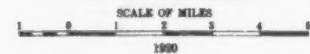


FOR FURTHER INFORMATION CONCERNING THE BOISE PROJECT  
AND METHOD OF OBTAINING LAND, WRITE TO THE STATISTICIAN,  
U. S. RECLAMATION SERVICE, WASHINGTON, D. C., OR OFFICE OF  
PROJECT MANAGER, BOISE, IDAHO.

DEPARTMENT OF THE INTERIOR  
JOHN BARTON PAYNE SECRETARY  
UNITED STATES RECLAMATION SERVICE  
A. P. DAVIS DIRECTOR  
F. E. WETMOUTH CHIEF ENGINEER  
**BOISE PROJECT IDAHO**

J. R. BOND PROJECT MANAGER  
MAP NO. 18400

Prepared in the Washington Office  
John H. Pollen Chief Draftsman



**INFORMATION OF INTEREST**

**WATER SUPPLY:**

Source of water supply: Boise River.  
Area of drainage basin: 2,610 square miles.  
Annual run-off in acre-feet of Boise River near Highland (2,610 square miles), 1886 to 1919: Maximum, 3,900,000; minimum, 1,118,000; mean, 2,186,688.

**AGRICULTURAL AND CLIMATIC CONDITIONS:**

Average supplied entirely by Government Water: 130,000 acres.

Average supplied with storage water: 130,000 acres.

Length of irrigation season: April 5 to October 5, 181 days.

Average elevation of irrigable area: 2,900 feet above sea level.

Rainfall on irrigable area: At Boise station for 50 years, average 15.81 inches; 1919, 11.46 inches.

Range of temperature on irrigable area: -28° to 111° F.

Character of soil of irrigable area: Clayey loam, light sandy loam, and sandy loam.

Principal products: Alfalfa, wheat, oats, clover, potatoes, apples, prunes, and small fruits.

Principal markets: Boise, Nampa, Caldwell, and Meridian, Idaho; Portland, Ore.; and eastern cities.

**STRUCTURES:**

96 concrete structures costing over \$20,000 each.

182 concrete structures costing from \$100 to \$2,000 each.

3,664 concrete structures costing from \$100 to \$100 each.

LENGTH OF CANALS:

50 miles with capacities greater than 300 second-feet, of which approximately two miles are lined with concrete; 44 miles with capacities of from 300 to 600 second-feet; 173 miles with capacities of from 50 to 300 second-feet; 730 miles with capacities less than 50 second-feet. In addition to the above there are 200 miles of constructed waste ditches and deep drains.

**DAMS:**

ARROWROCK: Type - Concrete, gravity and arch.

Maximum height - 348.6 feet. Length of crest - 1,100 feet.

Volume - 610,000 cubic yards. Cost - \$4,750,000.

BOISE DIVERSION: Type - Concrete-masonry, gravity.

Maximum height - 60 feet. Length - 550 feet. Volume - 21,749 cubic yards.

LOWER DEER FLAT EMBANKMENT: Type - Earthfill with grouted upstream slope. Maximum height - 52.5 feet.

Length - 7,500 feet. Volume - 1,938,000 cubic yards.

UPPER DEER FLAT EMBANKMENT: Type - Earthfill with grouted upstream slope. Maximum height - 72.5 feet.

Length - 4,000 feet. Volume - 1,082,274 cubic yards.

RESERVOIRS:

ARROWROCK: Area when full - 2,000 acres. Capacity - 200,000 acre-feet.

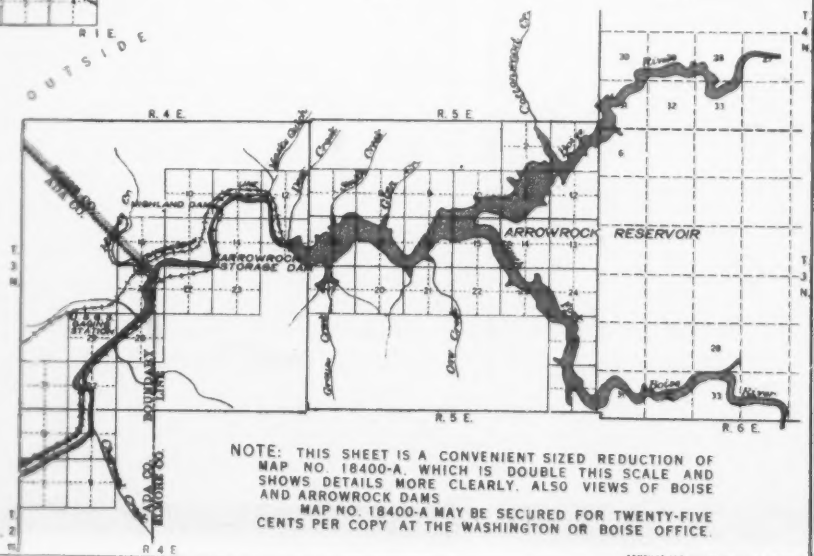
DEER FLAT: Area when full - 9,850 acres. Capacity - 177,000 acre-feet.

PROJECT PLAN:

The irrigation plan of the Boise project provides for storage of water in the Arrowrock Reservoir on Boise River, about 50 miles above Boise, and in the Deer Flat Reservoir near Caldwell and Nampa, Idaho; the diversion of water from Boise River by the Boise River Dam, about 8 miles above Boise; the distribution of water on the south side of Boise River, through the Main Canal, leading from the dam to the Deer Flat Reservoir; distributing laterals leading in the Main Canal; distributing canals leading in the Deer Flat Reservoir; and distributing canal systems leading in the Boise River below the Boise River Dam; and the distribution of water on the north side of the Boise River to a small area of land east of Boise through a canal system leading in the Boise River Dam. The United States claims all water, seepage, spring, and percolating water arising within the project, and proposes to use such water in connection therewith.

**EXPLANATION**

- CANALS CONSTRUCTED BY THE UNITED STATES
- CANALS NOT CONSTRUCTED BY THE UNITED STATES
- HIGH LAND AREA
- BOUNDARY OF PIONEER IRRIGATION DISTRICT
- BOUNDARY OF HAMPA MERIDIAN IRRIGATION DISTRICT
- BOUNDARY OF SETTLERS' IRRIGATION DISTRICT
- BENCH MARK ELEVATION ABOVE SEA LEVEL
- U. S. R. S. TELEPHONE SYSTEM
- WATER MASTER'S HOUSE
- THE PRESENT CAPACITY OF THE CANALS WILL NOT PERMIT PUMPING ONTO HIGH AREAS THUS INDICATED
- CONSTRUCTED DRAINS
- LANDS BELOW RIVERSIDE CANAL AND NORTH OF IRRIGATION DISTRICTS ARE OUTSIDE OF THE PROJECT



NOTE: THIS SHEET IS A CONVENIENT SIZED REDUCTION OF MAP NO. 18400-A WHICH IS DOUBLE THIS SCALE AND SHOWS DETAILS MORE CLEARLY. ALSO VIEWS OF BOISE AND ARROWROCK DAMS.  
MAP NO. 18400-A MAY BE SECURED FOR TWENTY-FIVE CENTS PER COPY AT THE WASHINGTON OR BOISE OFFICE.



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543049



# In the Supreme Court of the United States

OCTOBER TERM, 1924

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NAMPA & MERIDIAN IRRIGATION DISTRICT,  
appellant

v.

J. B. BOND, PROJECT MANAGER OF BOISE } No. 135  
Project of the United States Reclama-  
tion Service, and Payette-Boise Water  
Users' Association, Ltd. }

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR APPELLEE, J. B. BOND

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## STATEMENT

The Nampa & Meridian Irrigation District, plaintiff and appellant herein, will be designated in this brief as "the District."

The District brought this suit against the Project Manager of the Boise Project of the United States Reclamation Service. Its purpose was to obtain a decree enjoining him from withholding water from the District lands as a means of compelling the District to pay its proportion of the spe-

cial operation and maintenance charges fixed by the Secretary in his public notice of February 15, 1921 (R. 19, 20). The Payette-Boise Water Users' Association, representing the project lands outside the District, intervened and resisted the bill of complaint, to the end that those lands might not be compelled to bear the whole burden of future drainage work.

In the beginning, as stated by the District Court, all the project lands, whether within or without the District, had precisely the same status (R. 33). They were all bound by subscriptions to the stock of the Payette-Boise Water Users Association, and thereby subjected to a lien for the charges to be imposed by the Secretary of the Interior. The record does not show when the District was organized as a separate legal entity under the State laws. It does show, however, that the Water Users Association had made a contract with the District as early as October 12, 1906 (R. 12, par. 15).

Evidently there was no material change in the status of the project lands within the District until the contract of June 1, 1915, here in question. By that contract the project lands within the District were released from their stock subscriptions contracts with the Water Users Association (R. 12, pars. 15 and 16); the District took the place of the Water Users Association as the representative of those lands in their relations with the government, and became responsible, primarily, for the payment

of both construction and operation and maintenance charges (R. 10, par. 12).

One of the main inducements to the making of this contract was that large areas of the District lands were becoming seeped and water-logged, and required prompt drainage. These were the first lands in the project to need drainage, and the construction of a drainage system for them was the first matter dealt with in the contract. The government agreed to construct a drainage system for the District at the primary expense, of course, of the Reclamation Fund. As was just and equitable, the old water right lands were to bear the whole expense of that part of the drainage works serving them alone. But that part serving the project lands within the District was to be charged "to the general expense of the Boise Project" (R. 7 and 8, par. 3).

By the supplemental contract of November 5, 1918, the cost of this drainage system (then nearing completion) was fixed at \$340,000; the amount chargeable to the District exclusively, for the old water right lands, was determined to be \$162,369.84; and the remainder, \$177,630.16 (later apparently diminished by further adjustment of credits to \$158,139.56, R. 47), was charged to the government as part of the costs of the project and was finally included in the construction costs announced by the Secretary in his Public Notice of July 2, 1917. (16th Ann. Report Reclamation Serv-



ice, 126.) As the project lands outside the District comprise 100,000 acres and the project lands within the District 40,000 acres, it is apparent that the lands outside the District are now irrevocably charged with the expense of draining the District project lands in the proportion of  $2\frac{1}{2}$  to 1.

After the Public Notice fixing the construction charges, the Payette-Boise Water Users Association brought suit against the Project Manager to test the correctness of various items forming the basis of the construction charge fixed by the Secretary, but there was apparently no complaint as to the item now under consideration. After the rendition of an opinion by the District Court on the questions involved (269 Fed. 159), the suit was settled by a comprehensive agreement between the United States and the Water Users Association, dated July 12, 1921, which, by stipulation, was embodied in the final decree in that case (R. 19). By paragraph 10 of that agreement (R. 22) the Water Users Association (then representing only the project lands outside the District) stipulated that:

All future drainage work in the constructed unit of the said Boise Project shall be provided for by operation and maintenance charges to be announced from time to time by the Secretary of the Interior as operation and maintenance charges for drainage purposes, etc.

At the time, therefore, when the special operation and maintenance charge for drainage pur-

poses now complained of was made, the situation was that the lands outside the District were pledged (by this agreement) to pay a charge so fixed and denominated, and the District was pledged by the agreement of June 1, 1915 (par. 12), to pay "the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project," etc. It is a reasonable inference that the Secretary, in announcing the special charge, understood that both classes of lands were bound by these agreements to pay it.

However, the notice as issued does not purport to rest upon the agreements and contains no reference to them, and must therefore be considered as made under an authority and discretion which he believed was vested in him by law. The questions involved are, therefore, first, whether he had such authority under the law; and, second, whether, in any event, the District was bound by its agreement to accept and pay such a charge.

The courts below both decided that he had authority and discretion under the law to impose the special charge, and neither seriously discussed the District's agreement, although the Circuit Court of Appeals said that there was force in the government's contention regarding it.

We insist here on both propositions, and if either is sustained the decree below must be affirmed.

## ARGUMENT

## I

**The position of the appellant is wholly inequitable**

The necessity for drainage first arose within the District, and the government has constructed for it a drainage system. The cost of that part of the system draining project lands was assessed ratably to all the project lands as part of the costs of construction; and the lands outside the District, because of their greater area (100,000 to 40,000 acres), must pay for it in the proportion of  $2\frac{1}{2}$  to 1.

Now, when the lands outside need drainage, the District seeks on purely technical grounds to escape its ratable share of the burden. The court will not, of course, sustain a claim so grossly inequitable unless the technical grounds relied upon absolutely require it.

A further circumstance indicating the inequity of appellant's position is the fact that the original contract between the Secretary and the Irrigation District was prepared (and doubtless agreed upon in substance) before the passage of the Reclamation Extension Act of August 13, 1914 (38 Stat. 686), upon which the District now places its main reliance.

In its heading the agreement is styled "Draft of July 24, 1914," which was over three weeks before the passage of the Extension Act. In its first line, however, it purports to have been made June 1, 1915, and in the bill of complaint it is pleaded as

an agreement of that date. We assume, therefore, that it became effective on the latter date. It in fact contains no reference to the Extension Act and no provisions depending upon it or suggesting any consciousness of the existence of such an Act; but, on the contrary, recites that it is made under the provisions of the original Reclamation Act "and Acts amendatory thereof or supplementary thereto," and the Act of February 21, 1911 (36 Stat. 925)—known as the Warren Act. All its provisions contemplate a fair and equitable distribution of costs and expenses over all the project lands, and it is manifest that neither party then contemplated that the project lands in the District would or could escape any burdens then or thereafter equitably apportionable to them. And at that date it must certainly have been known to both parties that a necessity for drainage would soon arise on some of the project lands outside the District.

It was under such circumstances that the Secretary agreed to provide a drainage system for the District and thereafter actually did construct such a system at the primary expense of the Reclamation Fund. To now set up the provisions of the Extension Act and the alleged impracticability of assessing benefits under the State law, is wholly inconsistent with the agreement, and, as it seems to us, scarcely in keeping with good faith. It is certainly not in keeping with the fundamental requirements of the original Reclamation Act and of

the Warren Act, which are that the charges "shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, *and shall be apportioned equitably*" (Act June 17, 1902, 32 Stat. 388, § 4); and that the charges under contracts authorized by the Warren Act "shall be just and equitable as to water users under the government project" (36 Stat. 925, § 1). See *Swigart v. Baker*, 229 U. S. 187; *Yuma Water Ass'n v. Schlecht*, 262 U. S. 138.

The District Court commented severely upon the inequity of the appellant's claim. It said (R. 34):

During the earlier part of the operation of the system, when they were threatened with destruction or injury from the rising ground water, they sought and were given protection by the construction of a drainage system, the cost of which was included in the general construction charge, and as such was, of course, ratably apportioned to all the lands in the Project. Now, when as a result of the further operation of the system, for their use and benefit, as well as for the balance of the Project, other lands are menaced in the same way and from the same source, they seek to shift the entire burden of similar protective measures to the lands to be directly benefited. When they were threatened they did not, as now, invoke the doctrine of assessment of benefits; at least no such doctrine was recognized or applied in distributing the cost of the drainage facilities created for their protection.

## II

It is for the Secretary of the Interior to determine what are "costs of operation and maintenance," at least in the first instance; and his determination can only be attacked for fraud or gross error

In all the reclamation legislation up to this time there is no attempt to define "construction" charges or "operation and maintenance" charges. Section 4 of the Extension Act which appellant relies on, merely declares that no increase of "construction charges" shall be made "after the same have been fixed by public notice," except by agreement with a majority of the water users, etc. Section 5 merely declares that "in addition to the construction charge" water users shall be liable to an "operation and maintenance" charge, and then declares that such charge "shall be made for each acre-foot of water delivered"; but with a minimum charge of one dollar per acre, whether irrigated or not. Neither section throws any light upon what are to be considered charges of the one kind or the other.

The courts themselves have drawn no clear distinctions between the two classes of charges. Prior to the passage of the Extension Act this court had already held that "costs of construction," as used in the original Reclamation Act, included the expenses of operation and maintenance, and authorized the Secretary to impose a separate operation and maintenance charge upon each acre of

land for which water was furnished. *Swigart v. Baker*, 229 U. S. 187. In reaching that conclusion the court said (p. 193):

The statute provides that the cost of construction of the Project shall be charged against the land within the irrigable limits. The phrase is not expressly defined and being general in its terms is not necessarily limited to building, but may include the preservation and maintenance of what has been built. For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes for its maintenance. Power to construct a dock imposed the duty of operating it. Permission to "construct internal improvements" warranted the purchase of a plant already built, and authority to construct a road conferred power to maintain it. *In re Fowler*, 57 N. Y. 60; *Seymour v. Tacoma*, 6 Washington, 138; *Attorney General v. Boston*, 142 Massachusetts, 200; *Pelham v. Woolsey*, 16 Fed. Rep. 418; *Atchison & Ry. v. McConnell*, 25 Kansas, 370; *Bell v. Maish*, 137 Indiana, 226; *Weston v. Hancock County*, 98 Mississippi, 800, 54 So. Rep. 307. So, in the present case the statute provides that the Secretary may assess "the cost of construction of the project" without defining the term, and it may assist in arriving at the legislative intent to refer briefly to the facts leading up to the passage of the Reclamation Act.

In arriving at its conclusion the court laid particular stress upon the clear intent of Congress that



the reclamation fund was to be kept intact as a revolving fund, undiminished by costs or expenses of any kind. That decision and the cases cited by the court show that the expressions "costs of construction" and "construction costs" have no fixed and definite meaning universally or even generally applicable, but are to be construed in each case so as to carry out the purposes of the legislation in which they are found. Other decisions show that the same is true of the expressions "operation" and "maintenance" costs or charges. Thus it has been held that statutory authority to "maintain" a public park by the levy of special assessments includes authority to *improve* them, *People v. Ennis*, 188 Ill. 530; that a statute requiring coterminous owners to "maintain" fences between them was broad enough to include the erection of a fence, *Hoar v. Hennessy*, 29 Mont. 253; and that constitutional authority to provide by local laws for the "maintenance of public roads and highways" included authority to *provide* a system of roads and highways. *Ex parte Cooks* (Tex.), 135 S. W. 139; *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 156.

The foregoing decisions are of course somewhat exceptional, but they show how broad a meaning may be given when the fundamental purposes of the legislation require it. More apposite are those cases which deal specifically with operation and

maintenance charges. In *Schmidt v. Louisville, etc., Ry. Co.*, 119 Ky. 287, 302, it was said:

There is no rule of law declaring what constitutes operating expenses. That is to be determined by the testimony as to each item of expenditure. It is a matter of evidence, and determinable like any other fact. There can, in this view be no sort of inconsistency in this court holding now, *if the proof warrants*, that these matters, or any of them, are not operating expenses, and its having held on *a different state of facts, with different testimony*, that they were of that description.

On a preponderance of evidence, therefore, the court held that certain items comprising rents and taxes, among others, were chargeable to capital account and not to operating expenses.

In *Commonwealth v. Phila & Erie R. Co.*, 164 Pa. 252, on the other hand, it was decided that where a railroad company, after completing its roadbed, tracks, and other fixed structures, leased all its rolling stock and equipment from another road, the rentals paid therefor were chargeable as operating expenses, although it would seem that expenditures made to provide rolling stock and equipment, whether by purchase or lease, would more naturally be considered a capital charge. In *St. Louis Union Trust Co. v. Texas Southern Ry. Co.*, 59 Tex. Civ. App. 157, 165, 166, the following items, among others, were held to be operation charges: car rentals, rentals of terminal facilities,

loss and damage to freight and cars by fire, insurance on property, "certain taxes," ties and bridge timber, and claims and judgments for killing stock, and for personal injuries. After enumerating the items, the court added:

It cannot be said, as a matter of law, that the several demands mentioned did not grow out of and are not expenses necessarily incident to operation of the railroad—

thus recognizing the inherent impracticability of classifying, *as a matter of law*, all expenses into construction or capital charges and operation and maintenance charges, and the elements of fact and evidence to be considered in many cases.

In practically all cases, however, it is held that damages to persons and property caused by the operation of a railroad or other plant are chargeable as expenses of operation. *St. Louis Trust Co. v. Railway Co.*, *supra*; *Smith v. Eastern R. Co.*, 124 Mass. 154; *Green v. Railway Co.*, 97 Ga. 15; *Railway Co. v. Railway Co.* (C. C. A.), 93 Fed. 543; *Cowdrey v. Galveston, &c., R. Co.*, 93 U. S. 352, 354; *Barton v. Barbour*, 104 U. S. 126, 131; *Anderson v. Condict* (C. C. A.), 93 Fed. 349; *Klien v. Jewett*, 26 N. J. Eq. 474. In *Anderson v. Condict*, *supra*, it was said (p. 354):

Technically, perhaps, payment for personal injury cannot correctly be denominated cost of operation; *but it is an expense incurred in and by reason of the operation, and as such should be allowed in the accounts of the receiver.*

In September, 1920, Judge Dietrich, having before him certain questions relating to the construction charges fixed by the Secretary for this project, and referring to the probable future need of drainage for lands outside the District, said:

Seepage is one of the natural incidents of operating the system, and it would seem to be plain that the necessary expense of providing drainage to prevent damage therefrom is quite as naturally to be covered by revenues collected for operation and maintenance as any other expense to prevent damage from operation. (Payette-Boise Water Users Ass'n v. Bond, 269 Fed. 159, 170.)

Possibly the Secretary relied in part upon this suggestion, when, in the following year, he fixed the special operation and maintenance charge now in question. It is true that, some two years later, the Supreme Court of Idaho held that under the State law the expense of providing drainage was not a proper operation and maintenance charge, and therefore could not be assessed at a flat rate per acre. *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho, 45, 54, 57. The latter decision, while entitled to some weight, is the opinion of a single State Supreme Court on the general question as to what are proper operation and maintenance charges, can not of course be accepted as controlling in respect to the authority and discretion of the Secretary in fixing charges under the federal legislation.

Now, the necessity for draining irrigated lands and the expenditures therefor are direct results of the operation. The lower lands become water-logged from seepage and drainage from the higher irrigated lands and the ditches supplying them.

The water-logging increases progressively, and without drainage the lands affected rapidly deteriorate and soon become unproductive. The damage caused is "incurred in and by reason of operation," and is clearly analogous to damages to property and life in operation of a railroad or other plant.

Moreover, as was pointed out by the Circuit Court of Appeals in this case, it can not generally be known when and where water-logging will first appear or how far it will spread. Drainage works, therefore, can not safely be constructed until actual irrigation has been under way for a number of years. This is sufficiently shown in the Nineteenth Annual Report of the Reclamation Service. Thus it is said (p. 13):

Adequate drainage becomes, sooner or later, a matter to be dealt with on practically every project, and only the proper solution of the problem will result in preventing or checking seepage and water logging of the soil and deposits of alkali in amounts sufficient to deter plant growth and cause abandonment of the affected area.

To a large extent the drainage problem is closely allied with that of excessive use of water, although this is by no means true in all cases. However, many factors in the

problem will eventually be eliminated or lessened by insistence on the highest standards in the use of water, with stress laid upon the desirability of introducing the rotation system of water delivery wherever practicable.

Irrespective, however, of the methods employed in the delivery of water, there will always be a drainage problem, more or less serious, on most projects, since the escape of some water to the lower levels can not be avoided. Here the excess water joins ground water, with a consequent rise in the water table and a resultant condition of seepage, which can be corrected only by adequate drainage systems. A large part of the funds available to the Service necessarily has been and must continue to be employed in the construction of these drainage works. The results accomplished in protecting threatened areas and in reclaiming areas already seeped and water-logged fully justify the cost.

In these annual reports the conditions as to water logging and drainage for each government project are set forth in separate paragraphs, and they amply demonstrate that it is impossible generally to provide drainage systems in advance or even early enough to include them as "construction costs" in the public notice fixing those costs for the various projects. In some cases it is true that drainage expenses were included in the construction charges, but this was due to the fact that portions of many projects were irrigated for several years before the construction charges were

fixed; and seepage, where it then appeared, was taken care of in part by drainage works constructed early enough to include the expense in the charges announced in the public notice. The fact that in some instances they were so included did not amount to a final determination that all drainage expenses are "construction costs," because, if for no other reason, the words "costs of construction," as used in the original legislation, were by this court held to include all operating and maintenance expenses. *Swigart v. Baker, supra*.

On this topic we need only add that this court itself has recognized that the construction of drainage works must necessarily follow after a period of irrigation. In *Ide v. United States*, 263 U. S. 497, 506-7, it was said:

Measures for collecting and using the seepage could not well be taken in advance of its appearance. When it began to appear in appreciable quantity the plaintiff's officers took up the formulation of plans for utilizing it. The matter was much considered, for like problems were arising in connection with other projects.

The extent of the damage occasioned by seepage, or water logging, is shown by many items in the reports of the Reclamation Service. In many cases it has been necessary to suspend the collection of construction as well as operation and maintenance charges because the lands had been rendered unproductive by water logging. Thus in the Nine-



teenth Report (p. 168) it is said, referring to the Huntley Project:

For the calendar year 1919 operation and maintenance and construction charges were suspended on 1,366 acres of land that were seeped or had not been fully reclaimed from the effects of seepage.

Again (p. 249, Newlands Project):

Based upon surveys and examinations made during August, 1919, recommendation was made and approved granting temporary suspension of charges on 1,365 acres of seeped and alkali lands. This represented an area of about 144 acres in excess of that upon which charges were suspended during the previous year, but comprised only a portion of the lands so affected, etc.

Again (p. 316, Twentieth Annual Report, Belle Fourche Project):

Seepage encroachment during the year was very slight. The additional acreage relieved of charges on account of seepage amounted to 430 acres.

And again (p. 383, Shoshone Project):

The principal work was on open drains in the North Garland area, where 4,750 acres were damaged by seepage and 4,750 acres seriously threatened at the beginning of the year.

Many similar items occur in the reports for other years. They demonstrate not only that drainage expenses are incident to operation and a direct

consequence thereof, but also that without drainage large proportions of the project lands would become wholly incapable of returning to the reclamation fund the charges for which they are liable, thus defeating one of the fundamental requirements of the reclamation legislation.

It is apparent, therefore, that on the authorities cited, the question whether a particular item of expense is a construction cost, or an operation and maintenance cost, is mainly one of fact; and that damage by seepage is occasioned by, and is wholly a result of "operation," and therefore within the principle of the cases which hold that injury to persons or property by operation of a railroad or other plant are properly chargeable as expenses of operation.

It follows that, in classifying these expenses and imposing them upon the water users as costs of operation, the Secretary of the Interior determined a matter of fact, or a matter of mixed fact and law, and exercised a discretion vested in him by Congress. In doing so he has violated no statute, because there is no statutory definition of the terms employed; he has disregarded no legal principle established by the courts, for the courts themselves have announced no controlling principles, and the decisions most closely analogous favor the classification which he has adopted.

It was on this ground alone that the Circuit Court of Appeals upheld the Secretary's action. And we need only add that if this charge cannot

be imposed as an operation charge by the Secretary, then, under Section 4 of the Extension Act, it can only be imposed with the consent of the majority of the water users, as a construction charge. But as they were not deterred from bringing this suit by the gross inequity of the results they seek to achieve by it, there is little hope that they will voluntarily agree to do equity hereafter.

### III

**The appellant agreed, in substance and effect, to be bound by the decision of the Secretary in fixing operation and maintenance charges**

Section 12 of the contract provides, among other things (R. 11), that:

The project lands in the District shall pay the same operation and maintenance charge per acre *as announced by the Secretary of the Interior for similar lands of the Boise Project, etc.*

It will be noted that the agreement is not to pay its ratable proportion of the operation and maintenance expenses incurred, but to pay operation and maintenance charges "as announced by the Secretary." It may be admitted, of course, that if the Secretary in bad faith or by an abuse of discretion announced as an operation and maintenance charge an item of expense which, as a matter of law and by clear and definite decisions, was a construction expense, the District would not be bound to accept his decision. But in view of the

lack of any clear legal distinction between the two classes of expenses and the element of fact always to be considered, the agreement clearly referred the matter to the discretion of the Secretary, and the District was bound, under the contract, by his determination. In other words, the contract itself referred the determination to the officer with whom, as both the courts below have held, the law had already placed it. Indeed, it seems to us that this is so manifestly the effect of the contract that the decrees below might be affirmed, if necessary, on this ground alone. If this view is correct, then obviously the appellant is in no position to object that the charge as fixed by the Secretary was laid upon a per-acre basis instead of "for each acre-foot of water furnished," as required by Section 5 of the Extension Act; for the contract was to pay "an operation and maintenance charge *per acre*," as announced by the Secretary.

But in truth it is immaterial, so far as concerns that objection, whether the authority of the Secretary is rested on the law or on the contract, for in either event the District agreed that the charge should be on a per-acre basis.

#### IV

##### **Appellant's contentions**

1. It is contended, as we understand, that Section 8 of the original Reclamation Act requires the Secretary to be governed by State laws in fixing and apportioning charges. But the State laws with

which the Secretary is required to conform by that section are laws "relating to the control, appropriation, use, or distribution of water," and not laws relating to the determination of charges and the manner of assessing the same.

2. It is said that by the creation under the State laws of an irrigation district comprising only a portion of the project lands, such lands were constituted a "separate unit" of the project in the meaning of Section 5 of the Extension Act; and as a consequence thereof, that no charges can be assessed against those lands because they will not be benefited, in fact, by the improvement. It is evident, however, that "unit" as used in the reclamation laws means a body of lands within the general project which are so situated physically that they may be supplied, irrigated, operated, and drained (if necessary), by works so far independent of other parts of the project that the costs thereof may be segregated and charged against those lands alone. The creation or establishment of such a unit is necessarily the act of the Secretary, who must, of course, arrange his plans of development and adapt his methods of cost keeping to that end from the beginning. In fact, the 140,000 acres of project lands with which we are here concerned, lying partly within and partly without the District, constitute one "unit" of the Boise Project. The Boise Project in its entirety comprises 329,803 irrigable acres. (20th Ann. Rept. Reclamation Serv-

ice, page 134, "Summary of General Data.") In the "Statement of Case," filed by the Secretary in one of the suits connected with this project, which appears in the record here (p. 45 et seq.) under the heading "Notes" (p. 48) it is stated that—

The term "project lands" as used herein refers to lands *under the constructed unit* of the project and having no water rights from private canals, etc.

Manifestly this refers to the 140,000 acres as a unit of construction and a unit for fixing construction and other charges. Counsel themselves quote the above language in their brief (p. 18).

It obviously does not lie with the water users of a part of a project to establish such a unit, either by organizing themselves as an irrigation district under State law or otherwise.

In this instance, the contract between the Secretary and the appellant District is wholly inconsistent with an intention to create or recognize the project lands within the District as a separate unit of the "constructed unit." We need only refer to the first paragraph of the contract of 1915 which declares that "*as a part of the general drainage system of its Boise Project*" the United States will construct for the District a drainage system, etc. (R. 6); and to the provision in Section 12 declaring that—

The Project lands in the District shall pay the same operation and maintenance

charge as announced by the Secretary for similar lands of the Boise Project.

Indeed, the whole contract is based upon an equality of burdens for all project lands, whether within or without the District. When the District needed drainage for its own lands it did not urge the unit idea, which would have required it to pay the entire costs thereof, but, instead, acted upon the theory that the whole project was a single unit both of original construction and drainage.

3. It is urged that by the State laws applicable to irrigation districts, such as the appellant, the costs of drainage works must be assessed against the District lands on the basis of benefits derived therefrom; and that as none of the District lands will be benefited by the drainage of project lands outside, the District will be wholly unable to collect the charges fixed by the Secretary.

The obvious and sufficient answer seems to be that the decision of the questions here involved can not be influenced by any consideration of difficulties to be encountered in enforcing the decree, due to provisions of existing State laws, which have no bearing whatever upon the questions of right now to be decided. If this court shall affirm the decree below, we have no doubt the State would modify the assessment provisions of her statute if that should be found necessary to enable the District to comply with its contract and the decree of this court.



We doubt, however, whether the difficulty is as great as counsel seem to think. The obligation of the District is to pay to the United States the total amount charged by the Secretary against the project lands of the District; and we think it possible that a way might be found, even under the existing State laws, to so distribute the burden that the assessment would be upheld by the State courts.

We may suggest that the case of *Colburn v. Wilson*, 24 Idaho, 94, possibly points out a way. The case relates to a project developed wholly under State laws, and through a single irrigation district. The irrigated lands comprised two separate bodies, one on the north side and the other on the south side of the Payette River. Water was supplied through a canal having two branches, one serving the north side lands alone and the other the south side lands alone. It appeared that the expense of maintaining and operating the south branch of the canal greatly exceeded, per acre served, the like expense for the north side branch; and the complaint was that the directors of the District had assessed the total costs for both branches, together with other expenses, *at a flat rate per acre*, on all the lands of the project. Yet the Supreme Court sustained the assessment under the very statute here relied on, saying that it was within the discretion of the board of directors. And in *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho, 45, 57, the court, citing *Colburn v. Wilson*, *supra*, clearly

stated that operation and maintenance charges can be assessed, under the State law, at a flat rate per acre, while construction charges can not.

Now if this court shall affirm the decree below, its decision will necessarily establish that the cost of the drainage expenses are proper operation and maintenance charges, and that all the project lands are liable ratably for the total cost of drainage works, both those already completed for the District and those yet to be completed for the lands outside the District. In that situation it would seem that the State decisions above discussed would be applicable precedents, and the District authorities would then be free to assess the benefits at a flat rate per acre, just as the Secretary has done.

This, however, is a mere suggestion, and, as indicated above, it is not incumbent upon us to point out how the decree may be carried out under existing State laws.

In truth, however, the District is blowing both hot and cold. It says it has no means under the State law of collecting the charge from the lands which must ultimately bear the burden, and therefore should not be held liable for it. Yet, when the project manager proposes to use a very effectual means to aid it in collecting from the lands, namely, by refusing to furnish water until payment is made, it seeks to enjoin him.

4. It is contended that in fixing this charge at a flat rate (\$1.00 per acre) the Secretary violated the

provisions of Section 5 of the Extension Act. The contention is clearly unfounded. That section does first declare that the water user shall pay an operation and maintenance charge "for each acre-foot of water delivered." But this is immediately followed by a further declaration, really a proviso, that "each acre of irrigable land, *whether irrigated or not*, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water." This means, course, that each irrigable acre, whether irrigated or not, shall pay a minimum charge as if it had been furnished with one acre-foot, though in fact it received no water at all.

The charge imposed was at the flat rate of one dollar per acre, and the order expressly stated that this was to be considered "a part of the *minimum* operation and maintenance charge per acre," and that the remainder of the *minimum* charge and any additional charge "per acre-foot of water delivered," in excess of the minimum, would thereafter be announced.

If this drainage charge could be legally assessed at all as an operation and maintenance charge, there seems no possible reason why it should not absorb, wholly or in part, the minimum expressly provided for by the statute, leaving the regular operation and maintenance charge to be based wholly or in part upon the per acre-foot basis of water furnished in excess of one acre-foot.

## CONCLUSION

The position of the District is grossly inequitable. Damage from seepage and water logging is a direct consequence of operation (irrigation); and the cost of restoring the lands to productivity by constructing drainage works is properly chargeable, on settled principles, as an operation and maintenance charge. In any event, the classification of that expense as an operation and maintenance charge was within the power and discretion of the Secretary under the law. Moreover, and independently of any question of authority and discretion under the law, the District had by its agreement referred the classification of expenses to the Secretary and is bound by his determination in the absence of bad faith, which is not charged.

The decree should be affirmed.

JAMES M. BECK,  
*Solicitor General.*

IRA K. WELLS,  
*Assistant Attorney General.*

W. W. DYAR,  
*Special Assistant to the Attorney General.*  
FEBRUARY, 1925.



JAN 30 1923

W. M. B. STANLEY

# Supreme Court of the United States

OCTOBER TERM, 1922

No. 135

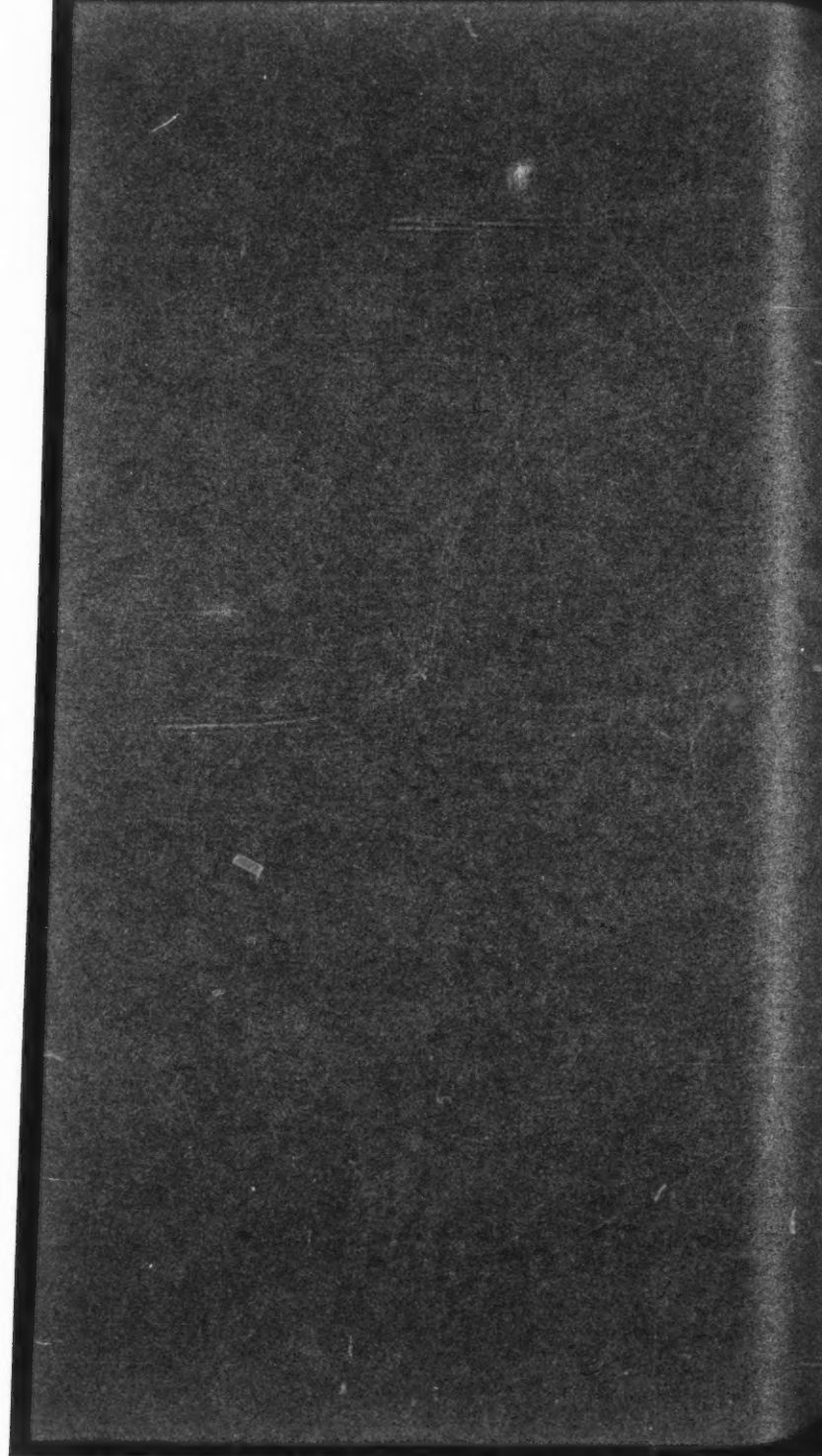
NAMPA & MERIDIAN IRRIGATION DISTRICT  
*Appellant,*

J. B. BOND, Project Manager of Boise Project of  
the United States Reclamation Service,  
*Appellee,*

PAYETTE-BOISE WATER USERS ASSOCIA-  
TION, Ltd.,  
*Intervenor and Appellee.*

BRIEF OF PAYETTE-BOISE WATER USERS  
ASSOCIATION, Ltd., *Appellee*

J. B. ELDRIDGE, Boise, Idaho,  
*Solicitor for Said Appellee.*



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# Supreme Court of the United States

OCTOBER TERM, 1923

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No. 473

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NAMPA & MERIDIAN IRRIGATION DISTRICT,  
*Appellant,*

v.

J. B. BOND, Project Manager of Boise Project of  
the United States Reclamation Service,  
*Appellee,*

PAYETTE-BOISE WATER USERS' ASSOCIA-  
TION, Ltd.,  
*Intervenor and Appellee.*

---

BRIEF OF PAYETTE-BOISE WATER USERS  
ASSOCIATION, Ltd., *Appellee*

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## STATEMENT OF THE CASE

The intervenor in this case, the Payette-Boise Water Users' Association, Ltd., was organized

“by the government of the United States for the very purpose of providing a centralized agency to represent the settlers. Under its Articles of Incorporation and By-laws, it was to perform important functions and by its contract assumed large obligations.”

Payette-Boise Water Users' Association vs. J. B. Bond, et al, 269 Fed. 159, quoting from the bottom of page 170 and top of page 171.

The Payette-Boise Water Users' Association and the government of the United States entered into the contract complained of as set forth in the complaint July 12, 1921.

T. p. 18 to 32, inclusive.

Paragraph 10 of said contract, among other things, reads as follows:

"10. It is agreed and understood that all future drainage work in the constructed unit of the said Boise Project shall be provided for by operation and maintenance charges to be announced from time to time by the Secretary of the Interior as operation and maintenance charges for drainage purposes and assessed against all project lands in the constructed unit, or first unit of the project. The operation and maintenance charges for drainage purposes coming due and payable in 1921 shall be One Dollar (\$1.00) per acre, of which Fifty (50c) per acre shall come due and payable April 1, 1921, and Fifty (50c) per acre on October 1, 1921."

T. p. 22.

The contract, entered into between the government of the United States and the appellant in this cause under which the appellant contracted for a large amount of drainage to be done and performed within the Nampa and Meridian Irrigation District by the government of the United States and under which a large amount of water rights was contracted to be

furnished by the government, among other things provides:

"The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project and the same shall be collected by the District for the United States and paid over by the District to the United States, and upon notices from the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge."

T. p. 11 and 12.

The contract further provides:

"WHEREAS, it is believed that under existing conditions the only way in which the additional water supply and drainage system required by the District can be secured promptly and at a cost which the land owners of the District can afford to pay, is by means of a contract between the District and the United States."

T. p. 6.

Also the following provision is found in the contract:

"1. That as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars (\$557,000.00). The location of the drains, to be constructed, is shown on the map attached hereto and marked Exhibit "A", it being understood that in general drains numbered "one" on the

said map will be constructed first, drains numbered "two" will be constructed next, drains numbered "three" will be constructed last, so far as said limit of expenditure will allow such work to go, such drainage system to have sufficient capacity in its main drains to carry the seepage water flowing into the District from the lands lying above the District and draining into it, as well as that originating in the District itself."

T. p. 6 and 7.

The contract also provides:

"3. That the District will pay to the United States for that portion of the above described drainage work in the District, equity chargeable to the old water right lands in the District, the sum of Two Hundred Sixty-six Thousand Dollars (\$266,000), in the same number of annual installments not less than ten (10) and same percentage of the total in each annual installment as is fixed by the Secretary of the Interior for the lands of the Boise Project in his Public Notice announcing the construction charge for the Boise Project."

T. p. 7 and 8.

The contract also provides:

"No portion of said sum of Two Hundred Sixty-six Thousand Dollars (\$266,000) shall be apportioned to the project lands in the District but the balance of the said sum to be expended on drainage works in the District as provided in paragraph 1 hereof shall be charged to the general expense of the Boise Project and the project lands in the District shall pay the construction, operation and maintenance charges provided in paragraphs 11 and 12 hereof."

T. p. 8.

The contract, among other things, provides:

"That after the construction thereof, the District will maintain said drainage system in good serviceable condition, at its own expense, and shall charge the cost thereof to the old water right lands in the District in the proportion which the amount of construction cost chargeable to the old water right lands in the District, to-wit, Two Hundred Sixty-six Thousand Dollars (\$266,000) bears to the total construction cost, to-wit, Five Hundred Fifty-seven Thousand Dollars (\$557,000), and will charge the balance to the United States."

T. p. 8.

The contract, among other things, provides:

"and each year after the completion of the Arrowrock Reservoir, will deliver to the District for distribution to the Project lands in the District lying under the canal system of the District, as nearly as practical, the same proportionate share per acre of the water actually available from said works of the United States, both flood water and stored water, as is provided for similar lands in the United States Boise Project, outside of the District except as otherwise provided in paragraph 12 hereof, but no more."

T. p. 11.

The supplemental contract between the government of the United States and the appellant here bears date the 5th day of November, 1918, (T. p. 13 to 17 inclusive) and among other things provides:

"1. WHEREAS, under that certain contract between the United States and the Nampa & Meridian Irrigation District, dated June 1, 1915, it is provided that as a part of the general

drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars (\$557,000)."

T. p. 13.

Said contract among other things provides:

"NOW, THEREFORE, it is hereby agreed that the District will purchase from the United States for said lands, and the United States will sell to the District for said lands, water rights from the irrigation works of the said Boise Project, and the District will pay the United States for said rights at the same rate per acre and will apportion benefits to said lands at the same rate per acre as other project lands in the District and the water rights to be furnished for said lands to be of the same kind and furnished upon the same terms and conditions as those furnished to project lands of the District outside of the corporate limits."

T. p. 16.

The bill of complaint, among other things, sets forth that the 40,000 acres of dry lands within the Nampa & Meridian Irrigation District constitutes a part of "the Government irrigation system of the Boise Project."

T. p. 1.

Then the bill of complaint sets forth the agreement to "pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise project."

T. p. 2.



It is alleged in the complaint that the water table on the Boise Project outside of the Nampa & Meridian Irrigation District is rapidly rising and that the lands unless drained will be ruined and suffer irreparable injury, meaning the lands under the government project and against which the government of the United States holds its lien for return of the money invested by it.

T. p. 2 and 3.

The complaint alleges the public notice of the Secretary of the Interior of February 15, 1921, levying assessments for drainage as operation and maintenance charges.

T. p. 3.

The only challenge to be found in the complaint of the authority of the Secretary to levy and collect charges for drainage is as follows:

“That the construction of said drainage works was not an operation or maintenance charge as contemplated in said contracts but was in fact a construction charge for the benefit of lands outside the Plaintiff District, which the Secretary of the Interior had no jurisdiction to levy against Complainant and which Complainant had no jurisdiction to levy under the laws of Idaho against the lands within its boundaries; and that the cost of said proposed drainage works should be collected solely from the Project Lands outside of Complainant District under the certain contract, stipulation and judgment, hereinafter referred to as Exhibits.....”

T. p. 3 and 4.

It is further alleged in the complaint that the Secretary of the Interior has no authority to construct the drainage works except under contracts with individuals, said allegation being as follows:

"That the Honorable Secretary of the Interior has no authority or jurisdiction to construct said works except under the said contracts of said individual land owners and with the payments made by them as provided therein."

T. p. 5.

The complaint further alleges that the defendant threatens and, if not enjoined and restrained by the mandatory injunction of this court, will refuse to specifically perform said contract and the prayer prays for specific performance.

T. p. 5.

The complaint refers to the contract between the government of the United States and the Payette-Boise Water Users' Association, intervenor, bearing date the 12th day of July, 1921, and sets up a portion of said agreement as an exhibit to the complaint and pleads what is known as "Exhibit X,"

T. p. 18 and 19.

but did not incorporate Exhibit "X" in the contract. Exhibit "X" forms a part of the contract of July 12th, 1921, between the government of the United States and intervenor herein, Exhibit "X," however, being referred to and being set out in the complaint in intervention, was before the court at the time it

rendered its decision from which this appeal is taken.

T. p. 45.

Exhibit "X" is a statement and dedication of the Boise Project showing the construction charges of the Boise Project including drainage done and performed under the contract of June 1, 1915, pleaded by the appellant herein between the appellant and the government of the United States, said Exhibit "X" shows just what portion of the drainage of the Nampa & Meridian Irrigation District was paid for by project lands outside of the Nampa & Meridian Irrigation District, which may be referred to as project lands under authority of the Payette-Boise Water Users' Association. Said Exhibit "X" will be found, beginning at page 45 of the Transcript, and the costs of drainage charged to the project outside of the district for drainage in the district is set forth on page 47 of the Transcript, the same being a large sum of money charged to the lands outside of the district for drainage within the district. The officers of the reclamation service moved to dismiss plaintiff's complaint on the ground that the same did not state facts sufficient to constitute a cause of action in equity and that the complaint stated no grounds for equitable relief.

T. p. 32 and 33.

The intervenor moved to dismiss plaintiff's complaint upon the same grounds set forth in the motion of the officers of the reclamation service and upon the

further ground that the United States of America is a necessary and indispensable party to the proceedings.

T. p. 44.

## ARGUMENT

An examination of the statement of this case, in which is set forth various excerpts from the contracts pleaded by the plaintiff, and of the bill of complaint discloses that the only objection raised in the complaint and the only thing complained of in the complaint is that the Secretary of the Interior is without jurisdiction to levy the assessments for drainage purposes. The term "jurisdiction" in its ordinary sense is used in connection with judicial officers and judicial proceedings but as used in the complaint the pleader undoubtedly intended to use it in the sense of lack of authority and treating the term in that sense, we find from an examination of the contract of June 1, 1915, between the Nampa & Meridian Irrigation District and the government of the United States that authority was expressly conferred by terms of contract upon the Secretary of the Interior to do the very identical things that he had done and of which the district complains, for we believe it must be conceded that the following language confers jurisdiction upon the Secretary:

"The project lands in the district shall pay the same operation and maintenance charge per acre

as announced by the Secretary of the Interior for similar lands of the Boise Project."

Now here it must be conceded that the district and the government have agreed that the Secretary shall have power and is given authority to levy assessments for operation and maintenance such as he levies against other lands outside of the district. There is no allegation in the complaint charging that the Secretary of the Interior has wrongfully or unlawfully levied any assessments or has acted arbitrarily or oppressively in levying the assessments or that he has charged more than was necessary for the work in hand or has committed a single act or done a single thing that is wrongful or hurtful to anyone. The only allegation in the complaint challenging his authority is that he is without "jurisdiction." Now, having agreed that the Secretary of the Interior could do these things and not complaining in any manner whatsoever as to how he has conducted himself or to whether or not the Secretary has acted to the injury of anyone or has invaded any lawful right of anyone or violated any statute, it seems to us clearly that the complaint fails to state any facts whatsoever entitling the plaintiff to relief.

Contracts investing a government officer, such as the contract before the court, with authority to act have often been construed by this Court and in the various Federal jurisdictions. In the case of *United States vs. Gleason*, this Court said:

"The judgment of an engineer to whom a contract refers the determination of the question of performance can be revised by the court only upon allegation and proof of bad faith or of mistake or negligence so gross as to justify an inference of bad faith."

United States vs. Gleason, 175 U. S. 588, 44 L. ed. 284.

Kihlburg vs. United States, 97 U. S. 398, 34 L. ed. 1106.

Innumerable cases could be cited to the same effect. Here we have no allegation of bad faith nor any complaint whatsoever except lack of jurisdiction which has been conferred by the very terms of the contract itself. There is no allegation whatsoever in the bill of complaint to bring the case within the well known rule of law that government officials may be sued, restrained and enjoined from doing some unlawful act through some arbitrary or oppressive conduct in violation of a citizen's right. But the court will search in vain for any allegation in the bill upon which such a claim may be predicated.

An examination of the complaint discloses that the Secretary of the Interior levied assessments for drainage in February, 1921, and that in July, 1921, a contract was made between the United States of America and the intervenor providing for drainage by means of operation and maintenance charges. The Secretary, however, as stated, had levied assessments on the 40,000 acres of land within the Nampa & Meridian Irrigation District known as project lands and

all of the other project lands outside of the Nampa & Meridian Irrigation District for drainage purposes prior thereto. The contract of July 12, 1921, is assailed in this proceeding, which, if successful, would abrogate a contract made between the United States of America and the intervenor, and the prayer of the complaint asks for specific performance against the officers of the United States. We believe that this proceeding so involves the government of the United States and its property as to in effect amount to a suit against the United States. The last announcement on the subject by the Supreme Court of the United States is to be found in the case of *Josephus Wells vs. Daniel C. Roper*, 246 U. S. 335, 62 L. ed. 755. Every presumption is indulged in favor of the acts of a public officer and in the absence of an allegation that the public officer has violated some law or committed some wrongful or arbitrary act, the presumption will be indulged that the Secretary has acted properly.

The presumption is always indulged in the absence of anything to the contrary that a public officer properly performs his duty.

*Weyauwega v. Ayling*, 99 U. S. 112, 119, 25 L. Ed. 470; *Martin v. Mott*, 12 Wheat 19, 31, 6 L. Ed. 537; *Galt v. Galloway*, 4 Pet. 332, 343, 7 L. Ed. 876; *Philadelphia, etc. R. Co. v. Stimpson*, 14 Pet. 448, 458, 10 L. Ed. 535; *Rankin v. Hoyt*, 4 How. 327, 335, 11 L. Ed. 996; *Wilkes v. Dinsman*, 7 How. 89, 131, 12 L. Ed. 618; *United States v. Weed*, 5 Wall, 62, 73, 18 L. Ed. 531;



Butler v. Maples, 9 Wall 766, 778, 19 L. Ed. 822; Miller v. United States, 11 Wall, 268, 300, 20 L. Ed. 135; Pendleton County v. Amy, 13 Wall. 297, 20 L. Ed. 579; Lapeyre v. United States, 17 Wall. 191, 200, 21 L. Ed. 606; Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; District of Columbia v. Robinson, 180 U. S. 92, 101, 45 L. Ed. 440; New York State v. Barker, 179 U. S. 279, 45 L. Ed. 190; Quinlan v. Green County, 205 U. S. 410, 422, 51 L. Ed. 860.

It is equally well established:

“That there is a presumption that a discretion vested in public officers has, in a given case, been rightfully and properly exercised.”

“Discretion rightfully exercised.—Butler v. Maples, 9 Wall, 766, 768, 19 L. Ed. 822; Cumming v. Richmond County Board of Education, 175 U. S. 528, 544, 44 L. Ed. 262; Philadelphia, etc. R. Co. v. Stimpson, 14 Pet. 488, 458, 10 L. Ed. 535; Wilkes v. Dinsman, 7 How. 89, 131, 12 L. Ed. 618; United States v. Weed, 5 Wall 62, 73, 18 L. Ed. 531; Mullan v. United States, 140 U. S. 240, 245, 35 L. Ed. 489; Swain v. United States, 165 U. S. 553, 559, 41 L. Ed. 823.”

The latest case we have been able to find in construing the authority given a public officer by means of the terms of a contract to perform an act and the binding effect thereof will be found in the case of Wells Bro. Co. of New York vs. United States, 254 U. S. 83, 65 L. ed, 148, wherein this Court, in con-

struing a contract very similar to the one between the Nampa & Meridian Irrigation District and the government of the United States relating to the payment of assessments "as levied by the Secretary," laid down the rule that such a contract vests in the public officer authority to perform the things provided for in the contract and also binding upon the parties thereto.

"The United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts."

United States vs. Babcock, 250 U. S. 328, 63 L. ed. 1011.

The most enlightening case we know of on the power and authority of the Secretary of the Interior to levy assessments for the purpose of maintaining government reclamation projects is to be found in the case of Swigart vs. Baker, 229 U. S. 187, 57 L. ed. 1143, in which, quoting from page 193 S. C. and page 1146 L. ed., this Court said:

"The statute provides that the cost of construction of the project shall be charged against the land within the irrigable limits. The phrase is not expressly defined, and being general in its terms, *is not necessarily limited to building, but may include the preservation and maintenance of what has been built.* For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes *for its maintenance.* Power to construct a dock im-

posed the duty of operating it. Permission to 'construct internal improvements' warranted the purchase of a plant already built, and authority to construct a road *conferred power to maintain it*. Re Fowler, 53 N. Y. 60; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; Atty. Gen. v. Boston, 142 Mass. 200, 7 N. E. 722; Pelham v. The B. F. Woolsey, 16 Fed. 418; Atchison T. & S. F. R. Co. v. McConnell, 25 Kan. 372; Bell v. Maish, 137 Ind. 226, 36 N. E. 358, 1118; Weston v. Hancock County 98 Miss. 800, 54 So. 307. So, in the present case the statute provides that the Secretary may assess 'the cost of construction of the project' without defining the term."

An examination of said decision discloses that under the statute all authority for levying operation and maintenance assessments was, by this Court implied, for the statute, in terms, provided no such authority, and it does not appear unreasonable in the light of the Swigart case to assume that the Secretary of the Interior has implied power to do all things necessary in a reasonable manner for the protection of the investment of the government of the United States in government reclamation projects in connection with their maintenance and to prevent the same from being destroyed and not only the government lose its investment but the settlers upon government reclamation projects lose their homes as well on account of seepage due to irrigation.

It has been decided, and we believe has become

firmly established that drainage is a necessary complement of irrigation and that it is a necessary integral part thereof.

Pioneer Irrigation District vs. Stone, 23 Idaho 344, 130 Pac. 382;

Bissett vs. Pioneer Irrigation District, 29 Idaho 98, 120, Pac. 461;

Hillcrest Irrigation District vs. Brose, 24 Idaho 376, 133 Pac. 662;

Nampa & Meridian Irrigation District vs. Petrie, 28 Idaho 227, 153 Pac. 421.

United States vs. Ide, 277 Fed. 382.

We believe an examination of the contract, excerpts which are set forth in the statement of this case, will clearly disclose that the Nampa & Meridian Irrigation District and the government of the United States had a definite understanding that the drainage system partially constructed under the contract would be extended and that the project lands within the Nampa & Meridian Irrigation District were to be treated as a part of the Boise Project and that supervision of those lands by the Secretary of the Interior was to be retained by him for the purposes of maintaining and protecting the project and that such lands were to be treated as a whole. The last excerpt from the contract, among other things, provides: That the project lands within the district shall receive the same,

“water rights \* \* \* \* \* to be furnished for said lands to be of the same kind and furnished

upon the same terms and conditions as those furnished to project lands of the district outside of the corporate limits."

There are expressions running all through the contracts, as shown by the excerpts in this brief, that those lands were to be treated by the government, acting through the Secretary, in the same manner and upon the same terms as project lands outside of the district and that a general drainage system for the Boise Project was started under the contract with the Nampa & Meridian Irrigation District and that extensions of it were contemplated and the use by the drains within the Nampa & Meridian Irrigation District were to be used by the project lands outside of the district and when we realize that, as shown by Exhibit "X" heretofore referred to, a large portion of the cost of drainage of the old, wet lands within the Nampa & Meridian Irrigation District were paid for and charged against the project lands outside of the district, we are confronted with an equitable situation that we believe the trial court was fully justified in taking cognizance of. It appears to us to be a most inequitable attitude for the Nampa & Meridian Irrigation District to assume, when it accepts contributions from project lands outside of its district for the draining of its old, wet lands within the district and then when called upon by the Secretary of the Interior to contribute its proportionate share necessary to protect a portion of the project outside of the

district, it refuses to do so yet retaining the benefits of the drainage provided for it at the expense of the project lands outside of the district.

We believe this attitude will not appeal to the conscience of this or any other court. The Circuit Court of Appeals should be sustained.

Respectfully submitted,

J. B. ELDRIDGE,  
*Attorney for Intervenor and Appellee.*

Service admitted by receipt of copy this.....  
day of January, 1925.

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*Attorney for Appellant.*  
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*Attorneys for Appellee, J. B. Bond.*

NAMPA & MERIDIAN IRRIGATION DISTRICT v.  
BOND, PROJECT MANAGER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT.

No. 135. Argued March 6, 1925.—Decided April 13, 1925.

1. When an irrigation system has been completed under the Reclamation Act, subsequent construction of a drainage system to remove injurious consequences of its normal operation on the lands included is chargeable to maintenance and operation rather than to construction, and § 4 of the Reclamation Extension Act, preventing increase of construction charges when once fixed except by agreement between the Secretary of the Interior and a majority of water-right applicants and entrymen affected, does not apply. P. 53.
2. This is consistent with attributing to construction the cost of drainage provided for in the original plan because the need for it was existent or foreseen. P. 54.
3. Where lands of an Idaho irrigation district were included in a federal reclamation project under a contract obliging the Government to furnish water and construct drainage works within the district, which was done and the cost assessed as a construction



charge against all the project water users, the district agreeing that the project lands in the district should pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the project, *Held* that the project lands within the district were liable with the other project lands to bear, as an operation and maintenance charge, the cost of providing drainage for project lands outside the district which were being ruined by seepage water from the operation of the irrigation system. P. 53.

283 Fed. 569; 288 *id.* 541, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a bill by which the Irrigation District sought to enjoin an official of the federal Reclamation Service and a water users' association from withholding water from lands within the District for nonpayment of maintenance and operation charges.

*Messrs. H. E. McElroy and Will R. King* for appellant. *Mr. Fremont Wood* was also on the brief.

*Mr. W. W. Dyar*, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Assistant Attorney General Ira K. Wells* were on the brief, for Bond.

*Mr. J. D. Eldridge* for Payette-Boise Water Users' Association, Ltd.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant is an irrigation district organized as a public corporation under the laws of Idaho. In 1915, its supply of water being insufficient to irrigate the lands of all its members, it entered into a contract with the United States, at that time engaged in the construction of the Boise irrigation project, for water to irrigate the unsupplied lands and for the construction of a drainage system

266 U. S. 85, but was for the purpose of overcoming injurious consequences arising from the normal and ordinary operation of the completed plant which, so far as appears, was itself well constructed. The fact that the need of drainage for the district lands, already existing or foreseen, had been supplied and the cost thereof charged to all the water users as a part of the original *construction*, by no means compels the conclusion that an expenditure of the same character, the necessity for which subsequently developed as an incident of operation, is not a proper *operating* charge. The same kind of work under one set of facts may be chargeable to construction and under a different set of facts may be chargeable to maintenance and operation. See *Schmidt v. Louisville C. & L. Ry. Co.*, 119 Ky. 287, 301-302. For example, headgates originally placed are charged properly to construction; but it does not follow that if an original headgate be swept away, its replacement, though requiring exactly the same kind of materials and work, may not be charged to operation and maintenance.

Appellant says the lands within the district are not benefited by the drainage in question; and, if a direct and immediate benefit be meant that is quite true. But it is not necessary that each expenditure for maintenance or operation considered by itself shall directly benefit every water user in order that he may be called upon to pay his proportionate part of the cost. If the expenditure of today does not especially benefit him, that of yesterday has done so or that of tomorrow will do so. The irrigation system is a unit, to be, and intended to be, operated and maintained by the use of a common fund to which all the lands under the system are required to contribute ratably without regard to benefits specifically and directly received from each detail to which the fund is from time to time devoted.

This conclusion, we think, fairly accords with the principle established by the supreme court of the state in

*Colburn v. Wilson*, 24 Ida. 94, 104; and we see no merit in the contention that under the state law a ratable part of the cost of this drainage cannot be assessed by the district upon the project lands within its limits because they are not benefited thereby. The cost of draining the district project lands was met by a charge imposed in part and proportionately upon the lands in the project outside the district. If now, when the latter need like protection, the district lands are called upon to assume an equivalent obligation, it requires no stretch of the realities to see, following from such an equitable adjustment, a benefit on the whole shared by both classes of lands alike. But in any event, since we find that the expenditure in question properly is chargeable to operation and maintenance, appellant is liable under the express terms of its contract.

*Decree affirmed.*